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NO. 87-1988

in the

Supreme Court

of the

United States of America

OCTOBER TERM, 1987

THEODORE B. GOULD, HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, CHOPIN ASSOCIATES, and MIAMI CENTER CORPORATION,

Petitioners,

vs.

THE BANK OF NEW YORK,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION OF RESPONDENT, THE BANK OF NEW YORK

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ISSUES PRESENTED

I.

Did the Bankruptcy Court, District Court, and Court of Appeals all err in entering or reviewing an order conditioning a stay upon the filing of an appeal bond?

II.

Was the doctrine of mootness correctly applied by the lower courts to the facts of the case?

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INTRODUCTION

The Petitioners, five affiliated debtors in consolidated bankruptcy proceedings below, have presented their various claims and arguments over the past four years to:

Two different Bankruptcy Judges of the United States Bankruptcy Court for the Southern District of Florida;

Ten different District Judges of the United States District Court for the Southern District of Florida, in over twenty separate appeals from bankruptcy court rulings; and

Eight Judges of the United States Court of Appeals for the Eleventh Circuit, in four separate appeals from District Court orders.

In one of the Eleventh Circuit opinions, that Court took the unusual step of labelling most of the debtors' arguments as "frivolous."[1]

STATEMENT OF THE CASE

The opinion of the Eleventh Circuit under review[2] was the culmination of three and one-half years of proceedings below. The five related debtor/Petitioners—Holywell Corporation ("Holywell"), Miami Center Limited Partnership ("MCLP"), Miami Center Corporation ("MCC"), Chopin Associates ("Chopin"), and Theodore B. Gould ("Gould")—filed voluntary petitions for reorganization under Chapter 11 in the United States Bankruptcy Court on August 22, 1984. The following day the Bankruptcy Court granted the debtors' motion for joint administration.

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[1]Opinion of March 18, 1988 in *Holywell Corp. v. Smith*, Case No. 87-5195 [App. 1] References to the Petitioners' appendix are denoted "____a," and references to the appendix to this Response are denoted "App. ____."

[2]Reported at 838 F.2d 1547 (11th Cir. 1988) and reprinted at 1a.

The filing of the petitions automatically stayed the then-pending state court foreclosure suit brought against the debtors by the Respondent Bank, as well as approximately 30 lawsuits and lien proceedings against the debtors brought by contractors, suppliers, another bank, the IRS, the Dade County Tax Collector, Gould's partners, and others. 11 U.S.C. §362. Over 400 creditors held claims totalling over $350 million.

From the outset, the debtors sought to delay reorganization in the hopes that they could sell or refinance the Miami Center Project[3] on favorable terms. The debtors twice sought and obtained additional time in which to file the required financial data. On December 7, 1984, the debtors moved for a two-month extension of time in which to file a plan. That motion was granted, and the debtors were permitted until February 15, 1985 to file a plan, but on a non-exclusive basis. Each of the five debtors filed a separate (but substantially-identical) plan and disclosure statement on the very last day of the extension period.

Next, the debtors sought to delay the Bank in establishing the extent, validity, and priority of its lien (because that secured claim was by far the largest—over $240 million). The debtors filed a lawsuit in the United States District Court for the Southern District of Florida ("the District Court Action") against the Bank and its participating lenders alleging fraud, RICO violations, and other claims in connection with the Miami Center construction loans made by the Bank. The debtors sought trial by jury. The debtors' strategy apparently was to delay the Bank's collection efforts for two years (or more) pending the jury trial of the District Court Action.

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[3]The Miami Center Project consists of a 34-story office building, a 34-story hotel, a parking garage, and retail space connecting the office building and hotel.

Conscious that the interest accruing on the construction loans[4] (principal was nearly $200 million) was jeopardizing the collectibility of the claims of all creditors, the Bank sought to expedite the proceedings. On February 5, 1985, the Bank filed its complaint to determine the amount, validity, and priority of its liens. The debtors sought to stay those proceedings in the Bankruptcy Court, but the Bankruptcy Court declined to grant such a stay. Two days before the scheduled trial of the Bank's complaint to prove its lien, the debtors filed an "Emergency Motion for an Order of Withdrawal Under 28 U.S.C. §157(d) and to Stay Other Proceedings," requesting the trial judge in the District Court Action to withdraw certain claims from the Bankruptcy Court and to stay the determination of the Bank's lien. That emergency motion was heard the night before the scheduled Bankruptcy Court trial. The District Judge declined to stay or otherwise interfere with the Bankruptcy Court's jurisdiction, and the trial went forward as scheduled.

The Bankruptcy Court ruled that the Bank's lien was valid in all respects. The Bankruptcy Court determined the Bank's lien to be in the amount of $234,342,742.19 through March 14, 1985, plus interest at $75,320.16 per day thereafter (at the default rate, and subject to adjustments based on the Bank's published prime rate).[5]

The Bank also filed a competing disclosure statement and plan which won acceptance by the creditors and was confirmed by the Bankruptcy Court. The debtors then sought

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[4]Interest at the default rate was accruing on the Bank's loans at over $2,200,000 per month. [App. 5].

[5]App. 4.

to delay implementation of the Bank's Plan by moving for a stay pending appeal in the Bankruptcy Court, in the District Court, and in the Eleventh Circuit Court of Appeals. However, the Eleventh Circuit Court of Appeals declined to review the District Court's requirement of a $50 million bond as a condition to a stay pending appeal.[6] The debtors did not file a further motion or petition for stay in this Court as they had announced they would in their motion papers in the Eleventh Circuit.

The debtors failed to post the appeal bond by October 10, 1985, as required by the District Court's Order of October 3, 1985, and the Plan became effective and has been substantially consummated since that time. The opinion of the Eleventh Circuit describes in detail the other pertinent facts of the case.

The Petitioners' statement of the case is inaccurate in numerous respects:

1. The description of the District Court Action (the Petitioners have labelled it the "Lender Liability Suit") brought by the debtors against the Banks is incomplete. The Petitioners omitted reference to a judicial determination that their claims were barred by releases they had signed in 1983 and 1984. *In re Holywell Corp.*, 49 Bankr. 694 (Bankr. S.D. Fla. 1985); App. 8).

2. The Plan provided for the sale of the Miami Center Project with interest on the mortgage debt computed at the pre-default rate rather than at the (higher) default rate.[7]

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[6]App. 7.

[7]At page 4 of the Petition, the term "accrued unmatured interest" is inaccurate.

3. The Plan did not provide for the "taking of assets not the property of the debtors' estates, owned by non-filed solvent affiliated creditors." (Petition, page 5). As the Bankruptcy Court, District Court, and Eleventh Circuit have determined, the Plan provided for the exercise by the Trustee of the debtors' option rights over those assets.

4. There has never been any judicial determination that the Bank subordinated insider claims totalling "$26,123,498" (Petition, page 5), nor is there any basis for that allegation in the record below.

5. The Plan did not pay claims against debtors using the cash of "separate, solvent non-debtor corporations" that were subsidiaries of debtor Holywell Corporation. As the Bankruptcy Court and the District Court found,[8] the debtor/Petitioners controlled all such funds, and the debtors voluntarily placed the funds under the jurisdiction of the Bankruptcy Court for the payment of creditors. The Eleventh Circuit affirmed the District Court and Bankruptcy Court rulings on that issue. [App. 15]. Subparagraph (f) on page 5 of the Petition brazenly ignores all three rulings.

6. The Plan dealt with the so-called "super-priority loans" and the tax claims. The super-priority loans (really inter-debtor loans) were dealt with in Article II of the Plan[9] and in an Order reported at 75 Bankr. 793 (Bankr. S.D. Fla. 1987). Tax claims were dealt with in Article III of the Plan.[10] There is no record support for the debtor/Petitioners' bald allegation that unpaid income taxes are "estimated" to be $20,763,841. (Petition, page 5, subparagraph (g)). At the time

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[8]The Opinion is reprinted at App. 15.

[9]App. 35.

[10]App. 36.

of confirmation of the Plan, there were no tax claims that were not covered by the Plan. Among other things, the Petitioners failed to disclose or deal with any such claims in the plans and disclosure statements they themselves filed in 1985. The creditors and the Bankruptcy Court rejected those plans.

7. There is no record support for the Petitioners' allegation that the Miami Center Liquidating Trust had $17 million in cash when the Eleventh Circuit ruled. (Petition, page 9). The Liquidating Trustee has not filed a current or complete accounting recently, but has advised the parties that all available funds will be applied to the pending claims.

8. In footnote 4 on page 10 of the Petition, the Petitioners imply that in a separate appeal brought by the "Miami Center Joint Venture" and its partners, the District Court reversed *in toto* the Confirmation Order. A review of the District Court's ruling demonstrates that the reversal and remand was directed to *only one claim* of the hundreds that were subject to the confirmed Plan. That claim was given a higher priority and a special mechanism for payment [143a], but the balance of the Plan and Confirmation Order remained intact.

9. The Petitioners have selectively quoted certain remarks made by the first Bankruptcy Judge assigned to the cases. [Petition, pages 12, 28; 158a]. The Petitioners have failed to disclose the following related and pertinent facts:

(a) The Petitioners sought and obtained a District Court Order requiring that Bankruptcy Judge to recuse himself, with the result that a second Bankruptcy Judge was appointed to handle the cases from the summer of 1987 to the present.

(b) The Eleventh Circuit refused to issue a writ of mandamus when the Petitioners claimed to have been prejudiced by the initial Bankruptcy Judge's strong feelings about Mr. Gould's behavior in the proceedings [Order of January 27, 1988 in Case No. 87-6105].

(c) Without authorization of any kind by the Eleventh Circuit, Mr. Gould wrote a nine-page letter to each Judge on the panel that issued the original mootness opinion. After a denunciation of the Bankruptcy Judge, Mr. Gould recited the same litany of issues that the District Court had decided against the Petitioners over a year before.[11]

(d) The Petitioners have repeatedly ignored the Bankruptcy Court's instructions, with the result that contempt proceedings against the Petitioners are pending.[12]

ARGUMENTS AGAINST GRANTING THE WRIT

The Petitioners have listed five "questions presented," but only three "reasons for granting the writ." An analysis of the Petition discloses only two real issues:

1. The propriety of the process by which an appellate bond was required; and

2. Whether the Court of Appeals correctly applied the mootness doctrine to the facts of this case.

These issues are addressed in order.

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[11]35a; reported at 59 Bankr. 340 (S.D. Fla. 1986).

[12]District Court Case No. 88-0628-Civ-Scott.

I.

The Bond Proceedings Were Proper.

The Bankruptcy Court confirmed the Bank's Plan on August 8, 1985. In order to stay the implementation of the Plan, the Petitioners filed a motion for stay pending appeal in the Bankruptcy Court. The Bankruptcy Court heard evidence regarding the amount of the creditors' claims (some $350 million), the value of the Petitioners' assets, and other matters. Both the Petitioners and the Respondent Bank submitted memoranda of law to the Bankruptcy Court.

The Bankruptcy Court agreed to stay implementation of the Plan pending appeal, but only if the Petitioners posted an appeal bond in the amount of $140 million.

The Petitioners immediately sought review by the District Court, which promptly conducted a hearing to review additional evidence and memoranda submitted by the parties. The District Court reduced the bond required to $50 million based upon a determination that the appeal could be briefed and argued on an expedited basis.

The Petitioners immediately sought review of that Order by the Eleventh Circuit. In their motion presented to that Court in October, 1985, the Petitioners requested the Eleventh Circuit to either modify the appeal bond requirements or continue a stay in effect to permit the Petitioners to seek further review to this Court. The Eleventh Circuit denied the motion. [App. 7]. The Petitioners did not seek further review by this Court at that time.

The Petitioners apparently claim that the bond requirement precluded a proper review of the Confirmation Order and Plan on the merits. That argument ignores the record and applicable law.

First, the Petitioners obtained a review on the merits, because the District Court initially denied the Respondent's motion to dismiss the Petitioners' appeal as moot. [35a; reported at 59 Bankr. 340 (S.D. Fla. 1986)]. The District Court correctly rejected each of the Petitioners' arguments on appeal.

Second, the propriety of a stay pending appeal and the size of an appeal bond are intensely factual, discretionary inquiries that are inappropriate for resolution by this Court. This Court does not grant certiorari to review evidence and discuss specified facts, *United States v. Johnston*, 268 U.S. 220, 227 (1925), and this is particularly true where two courts below have concurred in findings of fact. *Rogers v. Lodge*, 458 U.S. 613, 623 (1982); *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). In the *Graver Tank* case, Justice Jackson stated that this Court's standard of review of concurrent findings by two courts below is "a very obvious and exceptional showing of error." 336 U.S. at 275. That test is even more stringent than the "clearly erroneous" test of Rule 52(a), Federal Rules of Civil Procedure.

Here the stay and bond questions were considered on *three* levels below rather than just two. No error, much less a "very obvious and exceptional" error, has been shown by the Petitioners.

Apparently the Petitioners are urging this Court to require the District Courts and Courts of Appeal to enter a stay pending appeal without a bond whenever the appellant cannot afford to post a bond. In this case, such a ruling would have been a catastrophe for hundreds of creditors holding some $350 million in claims, most of whom had been waiting for two or more years for payment. If the Petitioners' argument had been accepted below, all of those creditors (including the Bank) would still be unpaid.

The lower courts correctly balanced the mounting interest losses to the creditors against the Petitioners' interests in preserving the *status quo* pending appeal. Literally hundreds of reported opinions addressing the factors a federal court has to balance in evaluating the propriety of a stay and the amount of an appeal bond have analyzed Rule 62, Federal Rules of Civil Procedure. There is no important constitutional or other purpose to be served by this Court's issuance of *certiorari* to review the lower courts' stay and bond proceedings in this case.

II.

The Court of Appeals Correctly Applied the Mootness Doctrine.

Likewise, the application of the mootness doctrine in a given case is particularly fact-driven. Individual decisions turn on the specific details of the confirmed plan of reorganization, the degree to which that plan has been implemented, the positions of the various parties to the proceedings, and the ability of a court to fashion "effective relief."[13]

In this case, the Eleventh Circuit noted that the District Court had made:

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[13]This Court has consistently denied certiorari jurisdiction where the court below had dismissed the action, in whole or in part, as moot. *See, e.g., In re Ken Davis Holding Co.*, 56 U.S.L.W. 3864 (1988); *Boston Chapter, NAACP v. Beecher*, 749 F.2d 102 (1st Cir. 1984), *cert. denied*, 105 S.Ct. 2154 (1985); *Metropolitan Transp. Auth. v. Federal Energy Regulatory Comm'n*, 796 F.2d 584 (2d Cir. 1986), *cert. denied*, 107 S.Ct. 1286 (1987); *Davis v. Lukhard*, 788 F.2d 973 (4th Cir.), *cert. denied*, 107 S.Ct. 231 (1986); *Seafarers Intenat'l Union v. National Marine Servs., Inc.*, 820 F.2d 148 (5th Cir.), *cert. denied*, 108 S.Ct. 346 (1987); *Fultz v. Rose*, 833 F.2d 1380 (9th Cir. 1987), *cert. denied*, 56 U.S.L.W. 3848 (1988); *Lashley v. First Nat'l Bank*, 825 F.2d 362 (11th Cir. 1987), *cert. denied*, 56 U.S.L.W. 3719 (1988).

> [D]etailed findings that the plan was fair, feasible, and that it had been substantially consummated. And it included the finding that it was *legally and practically impossible to unwind the confirmation of the plan or otherwise restore the status quo.*

Miami Center Ltd. Partnership v. Bank of New York, 1a, reported at 838 F.2d 1547, 1554 (11th Cir. 1988) (emphasis added). All of the administrative claims have been paid or reserved; secured claims have been paid in full; class 3 claims have been paid in full; undisputed claims in classes 4 through 6 have been paid in full and funds reserved for disputed claims; several disputed claims have been compromised; and there remain sufficient funds for the satisfaction in full or in part of the Petitioners' claims. *Miami Center*, 838 F.2d at 1552 and 11a. Further, the Miami Center Project was sold almost three years ago to the Bank's designee[14] and is now under new management. Pursuant to the Plan, the Bank advanced millions of dollars in new cash above the mortgage balance, and the Bank released to the Liquidating Trustee over $30 million in cash collateral. Based on those facts, the Eleventh Circuit instructed the District Court to dismiss the Petitioners' appeal as moot.

The Opinion below is totally consistent with the long line of precedent requiring Article III Courts to decide actual controversies by a judgment which can be carried into effect, and not to give advisory opinions on moot questions. *Mills v. Green*, 159 U.S. 651, 653 (1895). Accordingly, this Court and the federal circuits have consistently and uniformly held that a debtor's failure to obtain a stay pending appeal renders

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[14]Although not explicitly raised as an issue, Petitioners have suggested that because the Miami Center Project was sold to the Bank's designee, this was not a sale to a "good faith purchaser." The court below, however, held otherwise. *Miami Center*, 838 F.2d at 1554 (*citing with approval In re Bel Air Assocs., Ltd.*, 706 F.2d 301, 305 (10th Cir. 1983) and *Greylock Glen Corp. v. Community Savings Bank*, 656 F.2d 1, 4 (1st Cir. 1981)).

an appeal moot after a plan of reorganization has been substantially implemented.[15] "In this situation, the mootness doctrine promotes an important policy of bankruptcy law—that court-approved reorganizations be able to go forward in reliance on such approval unless a stay has been obtained." *In re Information Dialogues, Inc.*, 662 F.2d 475, 477 (8th Cir. 1981). Moreover, the Ninth Circuit Court of Appeals in *In re Roberts Farms, Inc.*, 652 F.2d 793, 796 (9th Cir. 1981) opined that "[i]n the field of the administration of estates under the bankruptcy laws, the policy of the law strongly supports a requirement that a stay be obtained if review on appeal is not to be foreclosed because of mootness." The implementation of a confirmed plan forever changes the positions and rights of the parties. It is these changes in circumstances and the creditors' reliance on a confirmed plan that make it impossible to fashion a remedy that would restore the interested parties to their former positions.

In light of this general rule and the underlying policy in favor of finality, Petitioners have strained to create a conflict among the circuits or a conflict between the decision of the Eleventh Circuit and the decisions of this Court. The decision below, however, is wholly consistent with the decisions of this Court and of the other federal circuits. There is one harmonious theme throughout the opinions of this Court, the Eleventh Circuit, and the other federal circuits—where it is impossible to fashion a remedy that would restore the

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[15]Notwithstanding the Petitioners' argument of hardship, the burden of posting a bond and thus obtaining a stay of the District Court's Orders was on the Petitioners. *In re Combined Metals Reduction Co.*, 557 F.2d 179, 190 (9th Cir. 1977). Moreover, Petitioners were not precluded from pursuing other alternatives to stay the execution of the Plan. *See, e.g., Texaco, Inc. v. Pennzoil Co.*, 626 F. Supp. 250 (S.D.N.Y. 1986) (debtor obtained preliminary injunction prohibiting execution of judgment where bond was excessive), *modified on other grounds*, 784 F.2d 1133 (2d Cir.), *reversed on other grounds*, 107 S. Ct. 1519 (1987).

interested parties to their former positions, it would be inequitable to consider the merits of the appeal.

The Petitioners have erroneously relied on the Ninth Circuit Court of Appeals' decision in *In re Sun Valley Ranches, Inc.*, 823 F.2d 1373 (9th Cir. 1987) in their attempt to create a conflict among the circuits. The Petitioners have misconstrued the holding of that court by narrowly focusing on the language of the *Sun Valley* court that an exception to the general rule of mootness exists where real property is sold to a creditor who is a party to the appeal. *Id.* at 1375. This myopic reading of the *Sun Valley* decision does violence to the principles of mootness and finality.

A careful review of the *Sun Valley* decision, other decisions of the Ninth Circuit, and decisions of the other federal circuits indicates that a proper reading of *Sun Valley* is more in line with the established principles of mootness. The "narrow exception" set forth by the Ninth Circuit in *Sun Valley* is really no more than a corollary of the general rule that where there are changes in circumstances which make it impossible to fashion a remedy that would restore the interested parties to their former positions, it would be inequitable to consider the merits of the appeal.

Consequently, it is noteworthy that in *Sun Valley*, the creditor's purchase of the real property was subject to the debtor's statutory right of redemption. This additional factor is decisive. The Ninth Circuit in *Sun Valley* did not establish a *per se* rule that an exception exists where the real property is sold to a creditor who is a party to the appeal. Instead, the Ninth Circuit followed the general rule that where it is possible to fashion an effective remedy, an Article III Court will consider the merits of the appeal. The possibility of fashioning such a remedy existed in *Sun Valley*, because the creditor's purchase was subject to the debtor's statutory right of redemption. This statutory right of redemption is not a

factor in this case, nor was it a factor in the decisions relied upon by the Court below in holding that Petitioners' appeal should be dismissed as moot.

The court in *Sun Valley* plainly recognized the limitations of its holding:

> This exception to the rule is especially appropriate here, where the foreclosure sale is subject to statutory rights of redemption. Where the assets sold were shares of stock, we said that "the fact that the purchaser is a party to [an] appeal does not change the applicability of the mootness rule."

Id. (*quoting Algeran, Inc. v. Advance Ross Corp.*, 759 F.2d 1421, 1424 (9th Cir. 1985)). Therefore, the fact that the purchaser is a party to the appeal is no more than a factor to be considered in determining whether it is possible to fashion a remedy.

This limitation is evident from the Ninth Circuit's citation with approval in *Algeran* of the Eleventh Circuit's decision in *In re Sewanee Land, Coal & Cattle, Inc.*, 735 F.2d 1294, 1296 (11th Cir. 1984). *Algeran*, 759 F.2d at 1424. The *Algeran* court specifically cites *Sewanee* as support for "the fact that the purchaser is a party to the appeal does not change the applicability of the mootness rule."[16] *Id.* The Ninth Circuit's statement in *Sun Valley* that it would not follow the position of the Eleventh Circuit is based upon a stated perception that the Eleventh Circuit has adopted a *per se* refusal to consider the fact that the purchaser is a party to the appeal. The Eleventh Circuit, in *Sewanee*, however,

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[16]The Ninth Circuit in *Worcester v. Rosner*, 811 F.2d 1224, 1228 (9th Cir. 1987) noted that in *Algeran* the Ninth Circuit adopted "the Eleventh Circuit's approach as to when a stay pending appeal is required in order to prevent mootness." This is hardly the language of a court disagreeing with one of its sister courts of appeals.

did not articulate such a *per se* rule. Rather, the court, in *Sewanee*, recognized that "[i]n *some* situations, failure to obtain a stay pending appeal will render the case moot." *Sewanee*, 735 F.2d at 1295 (emphasis added). Thus, despite Petitioners' assertion, the Eleventh Circuit has not adopted a *per se* application of the mootness doctrine, and an "irreconcilable conflict" does not exist as a result of the Ninth Circuit's decision in *Sun Valley*.

For the same reasons, the Ninth Circuit's decision in *In re Technical Knockout Graphics, Inc.*, 833 F.2d 797 (9th Cir. 1987) does not present a conflict. Notwithstanding the Petitioners' assertion, that court did not base its holding on the fact that all of the essential parties were before it. Rather, the basis for that court's holding is that despite the confirmation of the plan, it was still possible to fashion a remedy that would restore the interested parties to their former positions. In that case, a remedy was available because the only concern was the allocation of funds to pay differing tax liabilities to the IRS. That decision is consistent with the Eleventh Circuit opinion in this matter.

Moreover, contrary to Petitioners' assertion, the Eleventh Circuit relied upon more than its finding of "substantial consummation" for its ruling on mootness. The Eleventh Circuit cited *In re AOV Industries, Inc.*, 792 F.2d 1140 (D.C. Cir. 1986), *In re Roberts Farms, Inc.*, 652 F.2d 793 (9th Cir. 1981), and *In re Combined Metals Reduction Co.*, 557 F.2d 179 (9th Cir. 1977), in analyzing the factors to be considered in determining whether an appeal is moot.

> These cases tell us that in considering whether in a reorganization case matters not directly related to sales are within the mootness rule, the court may consider the virtues of finality, the passage of time, whether the plan has been implemented and

> whether it has been substantially consummated, and whether there has been a comprehensive change in circumstances.

Miami Center, 838 F.2d at 1555. All of these elements are present here.

Consequently, it is clear that the Eleventh Circuit has not adopted a *per se* approach as Petitioners suggest. Rather, the Eleventh Circuit considered substantial consummation as but another factual element for the reviewing court to consider in determining whether it can fashion a remedy. As the Eleventh Circuit held in this case, it is impossible to return the Plan proponent to its pre-confirmation status. Accordingly, the Eleventh Circuit's decision with regards to substantial consummation is consistent with the decisions of the other federal circuits.

Likewise, the appellate decisions in *AOV* and *Combined Metals* cited by Petitioners, and in *Roberts*,[17] are consistent with the Court's decision below. In *AOV*, the court cited *Combined Metals* for the proposition that even where "much of the debtor's property has been liquidated, and many of the creditors have been paid, the plan still controls the actions of the trustee." *AOV*, 792 F.2d at 1148 (*quoting Combined Metals*, 557 F.2d at 194). The *AOV* Court then contrasted the holding in *Combined Metals* with that in *Roberts*, and observed that the *Roberts* court had factually distinguished *Combined Metals*.

In distinguishing *Combined Metals*, the Ninth Circuit in *Roberts* observed:

> In this case the property transactions do not stand independently and apart from the plan of

[17]A discussion of *Roberts* is conspicuously absent from the Petition.

> arrangement. Here the many intricate and involved transactions . . . were contemplated by the plan of arrangement . . . and stand *solely* upon the order confirming the plan of arrangement for court approval and confirmation of the transactions.

Roberts, 652 F.2d at 797. The Court in *AOV* thus opined that "*Roberts Farms* does not stand for a bright-line rule that 'substantial consummation' forecloses any possibility of relief from court- and creditor-approved reorganization plans." *AOV*, 792 F.2d at 1148. The Bank agrees with this interpretation, and nothing in the opinion of the Eleventh Circuit below is at odds with this reading of *Roberts*. The District Court specifically found that it would be "legally and practically impossible to unwind the confirmation of the plan or otherwise restore the status quo." *Miami Center*, 838 F.2d at 1554.

The concern in *Roberts* is the same which faced the appellate court below and which is unchanged by the decision in *AOV*:

> Are we not quite patently faced with a situation where the plan of arrangement has been so far implemented that it is impossible to fashion effective relief for all concerned? Certainly, *reversal of the order confirming the plan* of arrangement, which *would knock the props out* from under the authorization *for every transaction that has taken place, would do nothing other than create an unmanageable, uncontrollable situation for the Bankruptcy Court.*

Roberts, 652 F.2d at 797 (emphasis added). Moreover, the District Court in *In re Revere Copper & Brass, Inc.*, 78 Bankr. 17, 22 (S.D.N.Y. 1987) noted that the appeal in *AOV* "was extremely circumscribed in scope."

Similarly, the Fourth Circuit's decision in *Central States, Southeast and Southwest Areas Pension Fund. v. Central Transport, Inc.*, 841 F.2d 92, 96 (4th Cir. 1988) is not in conflict with the decision of the Eleventh Circuit. The court's observation in *Central States*, as quoted by Petitioners, that substantial consummation does not immunize a plan from appellate review, is consistent with the other cases and with this case. In fact, the next sentence in the *Central States* opinion clearly reflects the same uniform and consistent articulation of the general rule:

> On the other hand, dismissal of the appeal on mootness grounds is required when implementation of the plan has created, extinguished or modified rights of persons not before the court, to such an extent that effective judicial relief is no longer practically available.

Id.

Likewise, the Tenth Circuit Court of Appeals' decision in *In re King Resources Co.*, 651 F.2d 1326 (10th Cir. 1980) is also consistent with the decision of the Eleventh Circuit and the decisions of the other federal circuits. The *King Resources* court held that if the "effect of reversal on appeal would be to order the impossible, we would not address the merits of the appeal." *Id.* at 1332. Unlike the record before the court below, the court in *King Resources* was unable to conclude on the record before it that the claim of substantial consummation had been clearly established. *Id.* Nevertheless, the court in *King Resources* was unconcerned with the question of mootness, because it ultimately affirmed the district court's decision. *Id.* at 1332, 1341.

The Petitioners have also attempted to suggest that a conflict somehow exists as a result of a line of cases holding

that a satisfaction of a judgment does not moot an appeal.[18] These cases, however, are inapposite and indicate no deviation from the general rule. The crucial inquiry is whether it is possible to fashion a remedy in equity that would restore the interested parties to their former positions.

Obviously, in the *Latham* case, which involved a single asset bankruptcy, the court had no difficulty in returning the parties to their prior position. Likewise, the decision in *Cahill*, which involved an award of money damages, and *Mancusi*, which involved the sentencing of a criminal defendant, pose no difficulty in restoring the parties to their former position. This is in stark contrast with the facts in this case where it is "legally and practically impossible to unwind the confirmation of the plan or otherwise restore the status quo." *Miami Center*, 838 F.2d at 1554.

Finally, the Petitioners argue that a due process violation vitiates the mootness doctrine. The Bank, of course, agrees that Petitioners are entitled to the protections afforded by both the substantive and procedural requirements of the due process clause of the Fifth Amendment. The factual circumstances in the cases cited by the Petitioners as support, however, are not even remotely close to the facts in this case. In both *In re Center Wholesale, Inc.*, 759 F.2d 1440 (9th Cir. 1985) and *In re Blumer*, 66 Bankr. 109 (9th Cir. B.A.P. 1986), there was an issue regarding the sufficiency of notice. Obviously, that concern is not present here. Rather, both the Bankruptcy Court and the District Court have considered the merits of the Petitioners' objections at length and rejected them.

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[18]*See* Petitioner's discussion of *In re Latham*, 823 F.2d 108 (5th Cir. 1987) and *Cahill v. New York, New Haven & Hartford R. Co.*, 351 U.S. 183 (1956) (Petition, page 18) and *Mancusi v. Stubbs*, 408 U.S. 204 (1972) (Petition, page 22).

This Court has acted consistently to limit and control the burgeoning workload of the federal court system. The mootness doctrine in bankruptcy cases is a significant element of that effort. Bankruptcy cases already have an additional level of review in the federal system. Debtor/appellants like the Petitioners here are able to obtain a thorough review of any lower court order (a) granting or denying a stay pending appeal or (b) establishing the amount of an appeal bond. In this case, the Petitioners sought review of such orders in 1985 through the level of the Court of Appeals, but abandoned their prior plan to seek further review of the stay order by this Court. For the sake of creditors, the litigants, and the federal system, a confirmed bankruptcy plan of reorganization must not be kept under an appellate sword of Damocles for the entire duration of the appellate process. If the debtor/appellants fail to post a bond as required, the parties should be allowed to consummate the plan and change positions in reliance upon the law of that case at that time.

To hold otherwise, as the Petitioners apparently urge, is to paralyze the ability of the bankruptcy courts to oversee and conclude reorganization cases.

CONCLUSION

The debtor/Petitioners have initiated over 20 appeals to the District Court and four review proceedings in the Eleventh Circuit over the past four years. Every court to consider the Petitioners' eight objections to the confirmed Plan [Petition, pages 13-15] has rejected these objections. The Respondent Bank has not sought to "avoid the merits" as alleged by the Petitioners. Indeed, the District Court affirmed the underlying Bankruptcy Court rulings on the merits over two years ago.

The Petitioners want this Court to sanction a stay pending appeal without a bond, in effect re-writing Rule 62 of the Federal Rules of Civil Procedure. The Petitioners also want this Court to review the fact-based mootness decision reached by a lower court.

Neither issue is appropriate for review by this Court. Both issues involve the application of well-established rules of law to specific questions of fact. Neither issue involves the abridgement of a constitutional right or a conflict between federal circuits. It is respectfully submitted that the Petition should be denied.

Respectfully submitted,

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By: /s/
Vance E. Salter

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of July, 1988, a true copy of the foregoing was mailed to:

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/s/
Vance E. Salter

Appendix

INDEX TO APPENDIX

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87–5195

D.C. Docket No. 86-0848

IN RE: HOLYWELL CORPORATION and
THEODORE B. GOULD,

Debtors.

HOLYWELL CORPORATION and
THEODORE B. GOULD,

Plaintiffs-Appellants,

versus

FRED STANTON SMITH, Liquidating
Trustee, and BANK OF NEW YORK,

Defendants-Appellees.

**Appeal from the United States District Court
for the Southern District of Florida**

(March 18, 1988)

Before VANCE and ANDERSON, Circuit Judges, and BROWN*, Senior Circuit Judge.

PER CURIAM:

The district court found that appellants were equitably estopped with respect to their claim to the proceeds of Twin Development Corporation's assets. We find no error in the

*Honorable John R. Brown, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

district court's analysis, and the record abundantly supports the district court's findings. Appellants' other claims on appeal are frivolous.

AFFIRMED.[1]

[1]The motion of appellee, Bank of New York, to dismiss the appeal as moot is DENIED.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

CHAPTER 11

CASE NOS.
84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-TCB
84-01594-BKC-TCB

ADV. NO. 85-0160-BKC-TCB-A

IN RE: HOLYWELL CORPORATION, et al.,
Debtors.

THE BANK OF NEW YORK,
a New York banking corporation,
Plaintiff,

vs.

THEODORE B. GOULD, individually, as partner of CHOPIN ASSOCIATES, a Florida general partnership, and as a general partner of MIAMI CENTER LIMITED PARTNERSHIP, a Florida limited partnership; MIAMI CENTER CORPORATION, a Florida corporation, as partner of CHOPIN ASSOCIATES, and as general partner of MIAMI CENTER LIMITED PARTNERSHIP; and HOLYWELL CORPORATION, a Delaware corporation,
Defendants.

JUDGMENT DETERMINING AMOUNT, VALIDITY, AND EXTENT OF LIENS OF THE BANK OF NEW YORK

THIS CAUSE came to be heard on March 14, 1985 upon the Complaint of The Bank of New York (the "Bank") to determine the amount, validity, and extent of the Bank's mortgage liens. Having reviewed the pleadings and heard argument of counsel, it is hereby ORDERED and ADJUDGED that:

1. This Court has jurisdiction to hear and determine this cause pursuant to 28 U.S.C. §§157(B)(2)(K) and 1334, and has jurisdiction over the parties.

2. The Bank is a New York banking corporation located in New York, New York, and is a secured creditor of the Debtors as set forth in Proofs of Claim filed on December 20, 1984 in case numbers 84-01590-BKC-TCB, 84-01591-BKC-TCB, 84-01592-BKC-TCB, 84-01593-BKC-TCB and 84-01594-BKC-TCB.

3. Defendants, Theodore B. Gould ("Gould") and Miami Center Corporation, a Florida corporation ("MCC"), are the sole partners of defendant Chopin Associates, a Florida general partnership ("Chopin") and are the sole general partners of defendant Miami Center Limited Partnership, a Florida limited partnership ("MCLP").

4. Defendant, Holywell Corporation ("Holywell"), is a Delaware corporation with its principal place of business in Arlington, Virginia.

5. Gould, MCC, Chopin, MCLP and Holywell are the Debtors in the above-styled proceedings, having filed voluntary petitions in this Court under Chapter 11 of the Bankruptcy Code on August 22, 1984.

6. Chopin is the fee owner and MCLP is the ground lessee and the owner of all improvements and personal property on the real estate located in Miami, Dade County, Florida ("Miami Center Phase I"), as described in the loan documents attached to the Bank's Complaint in this action.

7. The due execution, delivery, recording, and authenticity of the notes, mortgages, and other loan documents is not in dispute.

8. The Bank advanced to the Debtors under the terms of the notes and mortgages the sum of $196,711,481.58, all of which is secured by the mortgages.

9. The Bank notified the Debtors by letter that the loans were in default at all times after January 31, 1984.

10. Accrued interest on the loans, determined by the Bank at the "contract" (good standing) rate, to March 14, 1985 is $33,103,184.24, and is secured by the Bank's mortgages. Based on a Prime Rate of 10.5% per annum, interest will accrue at $64,171.66 per day from March 14, 1985. Any change in the prime rate (whether up or down) will affect that daily interest figure.

11. Additional accrued interest on the loans, determined by the Bank, commenced February 1, 1984. That additional default interest of $4,528,077.11 is payable to March 14, 1985, and is secured by the loan documents. Based on a prime rate of 10.5% such default interest will accrue in the additional amount of $11,148.50 per day under the loan documents for each day from March 14, 1985 (for a total daily sum of $75,320.16). Any change in the prime rate (whether up or down) will affect that daily interest figure.

12. The Bank claims additional amounts under the liens of the mortgages for pre-petition legal and loan expenses,

totalling $831,563.72. The Court reserves ruling on whether all or some part of such legal and loan expenses should be added to the mortgage lien.

13. The lien of The Bank of New York in and to the Debtors' real and personal property identified in the loan documents as against the Debtors is superior to any other claim or interest of the Debtors in and to said real and personal property.

14. This Court will retain jurisdiction to grant such further relief as may be necessary and proper.

15. The Court finds and decides that the total lien of the Bank (including default interest from February 1, 1984) is $234,342,742.93 to March 14, 1985, plus per diem interest from March 14, 1985, at the rate of $75,320.16 per day.

16. This Final Judgment is subject to the Court's Order, dated March 20, 1985, respecting the scope of the 1983 and 1984 releases executed by the Debtors.

DONE and ORDERED in Chambers at Miami, Florida, this 20th day of March, 1985.

/s/ Thomas C. Britton

UNITED STATES BANKRUPTCY JUDGE

cc: S. Harvey Ziegler, Esq.
Vance E. Salter, Esq.
Fred H. Kent, Jr., Esq.
Irving M. Wolff, Esq.

[FILED OCT 9, 1985]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-5887

MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, THEODORE B. GOULD, CHOPIN ASSOCIATES, HOLYWELL CORPORATION,
Plaintiffs-Appellants,

versus

BANK OF NEW YORK,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Florida

Before TJOFLAT, VANCE and KRAVITCH, Circuit Judges.

BY THE COURT:

Appellee's motion to dismiss appeal for lack of jurisdiction is GRANTED.

In re HOLYWELL CORP.,

Debtor(s).

The BANK OF NEW YORK,

Plaintiff,

v.

Theodore GOULD, et al.,

Defendant.

Bankruptcy No. 84-01590-BKC-TCB.
Adv. No. 85-0160-BKC-TCB.

United States Bankruptcy Court,
S.D. Florida.

March 20, 1985.

Debtors' largest secured creditor sought determination of amount, validity and priority of lien. Lien was disputed by debtors through two counts which asserted breaches of contract, one count which alleged fraud, another count which alleged criminal usury, and fifth count which asserted civil Racketeer Influenced and Corrupt Organization Act claim. The Bankruptcy Court, Thomas C. Britton, J., held that: (1) fraud, criminal usury and RICO civil claim were barred by releases even though claims did not exist at time releases were executed, and (2) it was legal to bar by release defenses of fraud, criminal usury, and RICO civil claim.

Debtors' motion for stay denied.

1. **Release —25**

Effect of release, executed in Florida, is to be determined by resort to Florida law.

2. **Release —33**

Under Florida law, releases signed by debtor as to fraud, criminal usury, and Racketeer Influenced in Corrupt Organizations Act [18 U.S.C.A. § 1961 et seq.] civil claim were not invalid even though claims did not exist at time releases were executed.

3. **Release —33**

Party may bar by release defenses to lien of fraud, criminal usury, and Racketeer Influenced and Corrupt Organization Act [18 U.S.C.A. § 1961 et seq.] civil claims.

4. **Usury —104**

Although usury violates statute and is contrary to public policy and, therefore, is illegal and unenforceable as between parties, party may lawfully waive and estop himself from asserting defense based upon usury and may do so by executing and delivering release.

5. **Release —33**

Where debtors explicitly contracted to release future as well as existing claims and unknown as well as known claims, debtors' fraud, criminal usury, Racketeer Influenced and Corrupt Organization Act [18 U.S.C.A. § 1961 et seq.] civil claim and two contract claims were barred as defenses to credtor's lien.

Barry Davidson, Miami, Fla., for plaintiff.

Fred H. Kent, Jr., Jacksonville, Fla., for defendants.

S. Harvey Ziegler, Miami Beach, Fla., Thomas F. Noone, New York City, for Bank of New York.

MEMORANDUM DECISION

THOMAS C. BRITTON, Bankruptcy Judge.

The debtors' largest secured creditor seeks a determination of the amount, validity and priority of its lien. The matter was heard on March 14.

The plaintiff's lien is diputed by the debtors through two counts which assert breaches of contract, one count which alleges fraud, another count which alleges criminal usury, and a fifth count which asserts a civil RICO claim.

Shortly after this adversary complaint was filed by the plaintiff/creditor, the debtors amended their complaint then pending in the District Court against the plaintiff/creditor by adding the five counts identified. In this action, the debtors have requested a stay by this court until the District Court can hear and determine the five counts in question after a jury trial.

These chapter 11 debtors have presented a plan for reorganization and the plaintiff/creditor has presented an alternative plan. Both plans are scheduled to be considered by confirmation, after a vote by the creditors on April 29. The plaintiff's claim exceeds $225 million and accrues interest at the rate of $2.4 million per month. The parties agree that every effort should be made to avoid any delay in the consideration of the pending plans and in the disposition of the dispute before them.

I am convinced that this court can best serve the parties, the remaining creditors who are not parties to this action, and the District Court by hearing and deciding now the

plaintiff/creditor's contention that the five defenses raised by the debtors are barred by releases executed by the debtors in June 1983 and again in June 1984.

The release of June 23, 1983 is in the form of a letter executed by the debtors Gould, Holywell Corporation, Miami Center, Ltd., Partnership and Chopin Associates in consideration of continued financing by the plaintiff bank. It provides that:

> "The undersigned release and discharge the Bank, its participants, successors and assigns, for all time, from any claims of any nature which the undersigned ever had, now or hereafter can, shall or may have in connection with or arising out of (i) the Loans or (ii) the Loan Documents."

The release dated June 11, 1984 is executed by the same four parties together with the debtor Miami Center Corporation. It is in consideration of the bank's forbearance of acknowledged defaults as well as additional financing. It provides:

> "Chopin Miami Center, Holywell, MCC and Gould each jointly and severally hereby release and discharge the Bank, its participants, successors and assigns for all time from any claims of any nature, whether known or unknown, which Chopin, Miami Center, Holywell, MCC or Gould ever had, now or hereafter can, shall or may have in connection with, or arising out of, or otherwise relating to the Loans or the Loan Documents."

The execution and delivery of these releases is conceded. The debtors do not claim any fraud or other irregularity in the inducement or execution of either release nor do they assert any other ground for avoidance of either release. It

is the debtors' only contention that three of their five defenses: the fraud, criminal usury and RICO civil claim (or at least some of these three defenses) did not exist at the time these releases were executed and, therefore, are not barred by the releases and, alternatively, it is not legally possible for a party to bar by release defenses of the nature asserted in these three counts. I find no merit in either contention.

[1] The parties agree that the effect of these releases, which were executed in Florida, is to be determined by resort to Florida law. In *Gunn Plumbing Inc. v. Dania Bank,* 252 So.2d 1, 4 (Fla. 1971), the Florida Supreme Court held that the waiver by defendants of the defense of usury in a prior action constituted an estoppel from raising the defense of usury to a second renewal note. The court noted that usury is a purely personal defense which may be waived and that:

> "it has no especial claims upon the indulgence and favor of the court, but must be disposed of upon the same principles and in the same manner as other defenses."

The court also said:

> "This Court is committed to the rule that it not only approves but favors stipulations and agreements on the part of litigants and counsel designed to simplify, shorten or settle litigation and save costs to the parties, and the time of the court, and when such stipulation or agreements are entered into between parties litigant or their counsel, the same should be enforced by the court, unless good cause is shown to the contrary."

[2] Although the *Gunn* case involved a stipulation in a pending case rather than a release executed by a possible prospective defendant, I am aware of no basis for considering

that a different rule would apply to a release. Similarly, I see no basis to enforce the release of the defense of usury but refuse to enforce the release of either a fraud or RICO civil claim merely because fraud and RICO claims, like usury, are based upon conduct which is contrary to public policy and is prohibited by statute.

Munilla v. Perez-Cobo, 335 So.2d 584 (Fla.Dist.Ct. App.1976) follows and applies *Gunn.*

In *Weingart v. Allen & O'Hara,* 654 F.2d 1096, 1103 (5th Cir.1981), the court applied Florida law, saying:

> "The district court was correct in determining that both of plaintiffs' claims, fraud and breach of contract, with respect to the Hollows and Boot Lake subcontracts, were released, and thus did not err in granting judgment n.o.v. on that basis."

[3] In *Ingram Corporation v. J. Ray McDermott & Co., Inc.,* 698 F.2d 1295, 1323, n. 30 (5th Cir.1983), the District Court had denied summary judgment in RICO claims and state and federal antitrust claims, where summary judgment had been sought by defendant based upon releases. The Court reversed and remanded holding that the antitrust and RICO claims are barred by releases unless the release is avoidable on equitable grounds. I see no reason why the same result should not be reached in the application of Florida law.

[4] The debtors have relied upon *Schaal v. Race,* 135 So.2d 252 (Fla.Dist.Ct.App.1961), which appears to me to be completely irrelevant to the issues before me, *Bond v. Koscot Interplanetary, Inc.,* 246 So.2d 631 (Fla.Dist.Ct.App.1971) and *Frye v. Taylor,* 263 So.2d 835 (Fla.Dist.Ct.App.1972). The last two cases each hold that agreements which violate statutes or are contrary to public policy are illegal, void and unenforceable as between parties. Neither case involved a

release or other waiver of a defense asserting illegality. It appears clear to me that although usury, for example, violates a statute and is contrary to public policy and, therefore, is illegal and unenforceable as between the parties, a party may lawfully waive and estop himself from asserting a defense based upon usury and that he may do so by executing and delivering a release. That appears to be the effect of the holding in *Gunn*. Neither of these cases undercuts that conclusion.

[5] The two releases executed by the debtors each explicitly contracted to release future as well as existing claims and unknown as well as known claims. I am aware of no Florida decision declaring such releases unenforceable, and the debtors have presented no such authority.

I find, therefore, that each of the five defenses asserted by the debtors is barred by the releases executed by these debtors. There is, therefore, no useful purpose to be served by the stay of this adversary proceeding pending determination by the District Court of the action before it. I fully recognize, of course, and take comfort from the fact that the determination of this court is subject to review by the District Court.

The debtors' motion for stay is denied. The parties have agreed that they can present a judgment fixing the exact amount of the debt owed to the plaintiff by each debtor and that plaintiff's lien has been duly perfected and is applicable to collateral which is undisputed. The parties are directed to submit such a judgment which will incorporate this court's determination that the plaintiff's lien is valid and enjoys a first priority. Costs, if any, may be taxed on motion.

[FILED FEB 20, 1987]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 86-0848-CIV-RYSKAMP

HOLYWELL CORPORATION, and
THEODORE B. GOULD,

Debtor/Appellants,

v.

THE BANK OF NEW YORK AND
FRED STANTON SMITH, AS LIQUIDATING TRUSTEE,

Appellees.

ORDER AFFIRMING DECISION OF THE BANKRUPTCY COURT

THIS CAUSE is before the court on appeal from a final order entered by the United States Bankruptcy Court for the Southern District of Florida.

I. Parties and Facts

The appellants are two of five debtors involved in chapter eleven bankruptcy proceedings in the bankruptcy court below.[1] These proceedings were apparently precipitated by

[1]The three debtors that did not appeal are Miami Center Corporation, a wholly owned subsidiary of Holywell, Chopin Associates, a partnership of which Theodore B. Gould and Miami Center Corporation are the sole general partners, and Miami Center Limited Partnership, a limited partnership with Gould and the Miami Center Corporation acting as general partners.

the inadequate financing of a construction project called the "Miami Center Project", which the debtors had attempted to finance in part through a loan from the Bank of New York (hereinafter "Bank"). Appellant and debtor, Theordore B. Gould (hereinafter "Gould"), is the sole stockholder and president of appellant/debtor Holywell Corporation (hereinafter "Holywell"), which is the parent company of Twin Development Corporation (hereinafter "Twin"). Gould is also the president and one of the directors of Twin.

On June 23, 1983, Holywell pledged, *inter alia*, Twin's stock to secure Holywell's guaranty of construction loans made to Holywell by the Bank. Approximately seven months later, Holywell and the other debtors defaulted on their obligations to the Bank resulting in the filing of bankruptcy petitions by the debtors. The debtors default entitled the Bank to the unfettered right to plenary ownership of Twin's stock. Thereafter, on October 1, 1984, Holywell and Gould moved the bankruptcy court to authorize and approve the sale of certain specified real and personal property owned by Twin and four limited partnerships, all of which are controlled by Gould and Holywell. The bankruptcy court entered an order approving and authorizing Holywell and Gould to consummate the sale of the "Washington properties".[2] Subsequently, the bankruptcy court directed Holywell to cause Twin to deposit into a segregated account, any funds payable to Twin from the sale of the Washington properties, and adjudged that the Bank had a first lien on the net proceeds owed Holywell, Gould, and Twin, from the sale of that property.

---

[2]The "Washington properties" refer to three office buildings located in the Washington, D.C., locality, which became a part of the assets of Twin, and four limited partnerships, all of which are owned by Gould and Holywell. Twin received its portion of the one hundred twelve million dollars in cash proceeds from the sale of the Washington properties, which sum is presently at issue on this appeal.

After the sale of the Washington properties, the bankruptcy court adopted the plan of reorganization submitted by the Bank. The Bank's plan consisted of the appointment of a liquidating trustee, who would be empowered to sell the Miami Center Project to the Bank, in lieu of the Bank's claims against the debtors. That plan was then affirmed on appeal by the district court in a thorough and detailed analysis by Judge Aronovitz (see case no. 85-3225-Civ-Aronovitz).

Finally, on January 28, 1986, the bankruptcy court entered an order granting the liquidating trustee, under the plan of reorganization, sole and complete authority over the Washington properties proceeds segregated in a bank account in Twin's name. This order was necessitated by Gould's contention that the liquidating trustee was without authority to effect the assets of Twin. From this order, Gould and Holywell appeal.

II. Jurisdiction and Mootness

The subject matter jurisdiction of this court has been invoked by the appellants pursuant to 28 U.S.C. §158, which grants district courts of the United States jurisdiction to hear appeals from final orders of bankruptcy judges in cases brought under title eleven of the United States Code. At the threshold, the appellees urge this court to decline the exercise of jurisdiction over this appeal, for they contend this appeal is moot. The appellees stress two points relating to the mootness of this appeal: First, they contend that the appellant's neglect in procuring an order staying the implementation of the plan of reorganization, submitted by the Bank and accepted by the bankruptcy court, is fatal to this appeal; second, the appellees maintain that the plan of reorganization has been "substantially consummated", as that phrase is defined in 11 U.S.C. §1101(2), and this appeal

should be dismissed as moot, since the liquidating trustee's funds have been depleted.

Respecting the appellees first contention on mootness, this court is unwilling to apply a per se rule which demands that a party secure a stay of a bankruptcy order to ensure its appealability. "Determinations of mootness . . . cannot be cabined by inflexible, formalistic rules, but instead require a case-by-case judgment regarding the feasibility or futility of effective relief should a litigant prevail". *In re AOV Industries, Inc., v. Hawley Fuel Coalmart, Inc.*, 792 F.2d 1140, 1147-48 (D.C. Cir. 1986). Accordingly, the inquiry on mootness should focus on the feasibility or impossibility of effective relief to the appellants, in light of the appellees assertion that the plan of reorganization has been consummated. Although it appears that the plan of reorganization has been implemented to a large extent, and the precise portion of Twin's proceeds from the sale of the Washington properties may not be identifiable from other funds in the debtors' estates, this court nevertheless concludes that effective relief is possible. This conclusion derives from the most recent report submitted by the liquidating trustee to the bankruptcy court indicating a surplus in excess of two million dollars in the debtors' estates. If this court were to conclude that the bankruptcy court erred in ordering that the liquidating trustee be entrusted with custody of Twin's funds, it is clear that the power to effect the surplusage in the debtors' estates would lie within this court's discretion. Consequently, this court rules that the instant appeal is not moot, and the exercise of jurisdiction over this appeal pursuant to 28 U.S.C. §158 is proper.

III. Standard of Review

Appellate review of the bankruptcy court's order granting the liquidating trustee complete custody of Twin's funds is guided by two standards. First, as to findings of fact made

by the bankruptcy court, they shall be affirmed unless it is demonstrated that they are clearly erroneous. Bankruptcy Rule 8013. Contrarily, the resolution of legal issues by the court below are subject to *de novo* review by this court. *See In re Matter of Butkin Bros., Inc.*, 757 F.2d 1573 (5th Cir. 1985).

IV. Equitable Estoppel

This court is cognizant of the equitable nature of bankruptcy jurisdiction and the pervading invocation of equitable principles in the exercise thereof. *Marin v. England*, 385 U.S. 99, 87 S.Ct. 274, 17 L.Ed.2d 197 (1966). In the instant appeal, it appears that the doctrine of equitable estoppel, a widely used equity concept in bankruptcy, as well as in other areas of the law, should be imposed against the appellant in affirming the order of the bankruptcy court below.

Essentially, equitable estoppel is a legal proposition which precludes a litigant from adhering to a position that is inconsistent with, or contradicted by, his statements, affirmative conduct, or acquiescence. The touchstone of estoppel lies in concepts of fair play and justice, *see, e.g., Schatzman v. Department of Health and Rehabilitative Services* (*In re King Memorial Hospital*), 19 Bankr. 885, 891 (Bankr. S.D. Fla. 1982), although its use is circumscribed to instances where certain technical requirements are present. Gould and Holywell have taken a position through their representations and conduct which contravenes both the legal stance they now assert on appeal and the one which they argued to the bankruptcy court. But prior to deciding estoppel is apposite based on fairness notions, the requirements of that doctrine must be closely examined.

The basic elements that must be established to properly invoke estoppel entail the following: "(1) words, acts, conduct,

or acquiescence, causing another to believe in the existence of a certain state of things; (2) willfulness or negligence with regard to acts, conduct or acquiescence; and (3) detrimental reliance by the other party upon the state of things so indicated." *Dooley v. Weil (In re Matter of Garfinkle)*, 672 F.2d 1340, 1347 (11th Cir. 1982); *see also, Minerals & Chemicals Philipp Corp. v. Milwhite Co.*, 414 F.2d 428 (5th Cir. 1969).

It is ineluctably clear that the first formal element of estoppel is present in the instant appeal. The appellants have repeatedly made representations to the effect of acknowledging that the proceeds from the Washington properties allocable to Twin would be available to creditors in satisfying claims against their estates in bankruptcy. For instance, Gould and Holywell represented to the bankruptcy court, the Bank, and numerous other creditors, that the sale of the Washington properties was

> in the best interest of the Debtors and of the creditors in these proceedings in that the immediate cash infusion from such sale[,] which inures to Holywell and Gould[,] [would] provide the Debtors with capital much needed as an essential part of the reorganization sought in these proceedings.

Debtor/Appellants' brief, pg. 3.

Further, prior to the adoption of a reorganization plan by the bankruptcy court, Holywell and Gould submitted disclosure statements and proposed a plan of reorganization. The Holywell disclosure statement made manifest to the court and creditors alike, including the Bank, that the cash proceeds derived from the sale of the Washington properties apportionable to Twin would serve as a source of funds for creditors' claims (see record, No. 466, pg. 4). Additionally, the appellants filed certificates with the bankruptcy court relating to their proposed plans of reorganization, revealing

that funds in excess of fourteen million dollars, including Twin's proceeds from the Washington properties located in a segregated bank account, would be assessable to quench claims of creditors. Indeed, Gould even testified in bankruptcy court that the Twin proceeds "had to go to Holywell as dividends", thus suggesting those funds would be appropriate for the satisfaction of creditors' claims (see record, No. 385h, pgs. 49-50).

In addition to these express representations, Gould and Holywell acquiesced in the Bank's justifiable presumption that Twin's proceeds from the Washington properties would be included within the debtors' estates. For example, the bankruptcy court directed Holywell to deposit into a segregated account any net funds payable to Twin from the sale of the Washington properties. Neither Gould nor Holywell appealed this order by the bankruptcy court, but rather tacitly accepted the order of the court. Moreover, after the Bank moved for a determination that all funds, including the Twin proceeds, were cash collateral subject to the Bank's lien, the bankruptcy court ordered that the proceeds constituted "cash collateral as defined in §363 of the Bankruptcy Code" (see debtor/appellant brief, pg. 79). Neither Gould nor Holywell took appeal from this order.

Subsequently, the Bank filed its proposed plan of reorganization, which directed that the proceeds from the Washington properties attributable to Twin be incorporated with funds in the Miami Center Liquidating Trust and serve as a font for permissible claims against the debtors' estates. The appellants did not enter any objections to the Bank's plan, and after the bankruptcy court approved the Bank's plan, they did not raise the issue presently at bar on appeal.

In totality, the express statements made by Gould and Holywell, amalgamated with their conduct and acquiescence respecting the availability of Twin's proceeds from the sale

of the Washington properties, results in the conclusion that their representations caused the Bank to believe in, and rely on, the existence of a certain state of things: namely, that the Twin funds could be applied to creditors' claims against the liquidation fund established by the bankruptcy court. Accordingly, the first element of estoppel is satisfied.

The second element of estoppel requires a finding that the party against whom the doctrine is imposed acted willfully or negligently with regard to their statements, acts, and acquiescence. *Dooley*, 672 F.2d at 1347. There can be no doubt that Holywell and Gould were, at the very least, negligent in not informing and Bank prior to this motion before the bankruptcy court that it did not intend to allow Twin's proceeds to be applied to creditors' claims. In point of fact, there is a strong inference stemming from Holywell's disclosure statement, the appellants' proposed plan of reorganization, Gould and Holywell's statement that the sale of the Washington properties would be beneficial to creditors, and Gould's testimony, that the actions of Gould and Holywell were willful. In any event, it seems indisputable that Gould and Holywell failed to conduct themselves in a reasonable manner; by neglecting to object to the numerous orders of the bankruptcy court establishing the propriety of applying Twin's proceeds to creditors' claims, and by concealing from the Bank their true intention to thwart such a use of the proceeds if at all legally possible, the appellants evidenced the requisite intent under equitable estoppel.

The third element of estoppel engages the court in an inquiry whether the party to whom representations have been made detrimentally relied upon the state of things as indicated by the representer. *Dooley*, 672 F.2d at 1347. For this element to be met, the Bank must have detrimentally relied on the appellants' representations and conduct. The appellants' statement that the sale of the Washington properties would accrue to the ultimate benefit of creditors,

by providing a cash infusion to the debtors' estates, was relied upon by the Bank in deciding not to object to the sale of the Washington properties. Likewise, the Bank relied on Holywell's disclosure statement, the appellants' failure to complain about the Bank's plan of reorganization and the order adopting that plan, the appellants' failure to appeal an order clarifying that the Twin proceeds could be used by the liquidating trustee, and Gould's testimony, all of which suggested expressly or implicitly that Twin's share of the proceeds from the sale of the Washington properties was available for payment to creditors.

Moreover, the Bank acted upon these statements and the appellants' conduct by distributing a large segment of Twin's funds to creditors. To countenance the legal position assumed by the appellants would cause great detriment to the Bank. The Bank would likely be held responsible for reacquiring any funds paid out of Twin's funds. The Bank's detrimental reliance upon the conduct of the appellants is therefore most patently illustrated by its authorization and distribution of Twin's funds to creditors.

V. Conclusion

Consequently, this court is certain that the imposition of equitable estoppel against the appellants is dictated by precepts of equity, justice and fair play, and accords with the technical elements established in *Dooley*. Gould and Holywell have taken a posture which is surely inconsistent with their express statements and conduct, which led the Bank to distribute the Twin proceeds; the Bank's detrimental reliance on the appellants' representations leads this court to the inexorable conclusion that the appellants cannot maintain their position in this court of law.

In affirming the decision of the bankruptcy court on equitable estoppel grounds, this court pretermitted any

discussion of substantive consolidation. However, it is apparent to this court that the reorganization plan of the bankruptcy court did not "substantively consolidate" Twin within the meaning of that term in §105 of the Bankruptcy Code; Twin's assets and liabilities, with the exception of the proceeds from the sale of the Washington properties, remained wholly intact under the plan of reorganization. Furthermore, assuming substantive consolidation of Twin did occur under the plan adopted by the bankruptcy court, the factors enumerated in *In re Donut Queen Ltd.*, 41 Bankr. 706, 709 (Bankr. E.D.N.Y. 1984), would militate in favor of upholding such action by the bankruptcy court.

Therefore, after careful review and consideration of the record and the court being fully advised in the premises it is hereby;

ORDERED and ADJUDGED that the appeal from the final order of the bankruptcy court granting the liquidating trustee complete control over Twin's proceeds arising from the sale of the Washington properties is affirmed.

DONE and ORDERED at the United States District Court, Miami, Florida this 20th day of February, 1987.

KENNETH L. RYSKAMP
UNITED STATES DISTRICT COURT

copies furnished to:
all counsel of record

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

CHAPTER 11 Proceedings

CASE NOS.
84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-TCB
84-01594-BKC-TCB

IN RE: HOLYWELL CORPORATION, et al.,

Debtors.

AMENDED CONSOLIDATED PLAN OF REORGANIZATION PROPOSED BY THE BANK OF NEW YORK

CONSOLIDATED PLAN OF REORGANIZATION

TABLE OF CONTENTS

The Bank of New York submits the following Plan of Reorganization:

I. DEFINITIONS

In addition to such other terms as are defined in other Articles of this Plan, the following terms have the following meanings as used in this Plan:

Administration Claim: A cost or expense of administration of these Chapter 11 cases, including any actual, necessary expenses of preserving the estates, and any actual, necessary expenses of operating the Debtors' businesses from and after the Petition Dates, to and including the Confirmation Date, and all allowances approved by the Court in accordance with the Code.

Affiliated Creditors: Any "affiliate" of any of the Debtors as "affiliate" is defined in Code §101(2), including but not limited to, any of the Debtors, any corporations that are wholly or partially owned, either directly or indirectly, by all or any of the Debtors, and any entities in which any or all of the Debtors own an equity interest, including, but not limited to, Twin Development Corporation, HWL Corporation, Parkwell, Inc., Orion Industries, Inc., Parkwell of Florida, Inc., Holywell Construction Co., Charleston Center Corp., Pietro Belluschi & Associates, Inc., NHA corp., Studley-Holywell Assoc., Inc., 1300 N. 17th Street Associates, Eleven DuPont Circle Associates, DuPont Land Associates, 1616 Reminc Limited Partnership, 1616 Arlington Associates, PBA, Inc., TBG Institute, Whitehall Security of Florida, Inc., Whitehall Building Services of Florida, Inc., Orion Engineering of Florida, Inc., Holywell Management of Florida, Inc., Racing Club of Florida, Inc., Holywell Hotels of Florida, Inc., Holywell Trading of Florida, Inc., Holywell Real Estate, Holywell Telecommunications of Florida, Inc.,

Holywell Insurance Company, Corpus Christi Associates and Great Western Bank Building Associates, but not including MCJV.

Allowed Claim: A Claim, (a) a proof of which is filed within the time fixed by the Bankruptcy Rules (hereinafter defined) or by the Court, or if the Claim arose from the rejection of an executory contract or unexpired lease, within such other time as may be fixed by the Court, or (b) that has been, or hereafter is, scheduled by Debtors as liquidated in the amount and not disputed or contingent; as to which no objection to the allowance thereof has been filed within any applicable period of time fixed by an order of the Court, or as to which any such objection has been determined by a Final Order.

Bank, The Bank, BNY: The Bank of New York.

Bankruptcy Code or Code: Title 11 U.S.C. Sections 101 *et seq.*

Bankruptcy Rules: The Bankruptcy Rules as prescribed by the Supreme Court of the United States, to take effect on August 1, 1983.

BNY Debt: The indebtedness, including interest at the pre-default contract rate to January 31, 1984 and at the post-default contract rate from February 1, 1984, due to BNY from MCLP and Chopin in the amount of approximately $234,342,743 as of March 14, 1985 plus expenses of approximately $1,611,563 to March 14, 1985.

BNY Holywell Loan: The $1,750,000 loan made by BNY to Holywell on October 23, 1983, which loan was guaranteed by Gould, plus interest to October 23, 1983 to August 31, 1984 at the pre-default contract rate and from September 1, 1984 at the post-default contract rate.

Claim: Any right to payment or right to an equitable remedy for breach of performance if such breach gives rise to a right to payment against any of the Debtors in existence on or as of their respective Petition Dates as described in Section 101(4) of the Code.

Confirmation Date: The date of the entry by the Court of the Order of Confirmation (hereinafter defined).

Court: The United States Bankruptcy Court for the Southern District of Florida, including the Bankruptcy Judge presiding in the Debtors Chapter 11 cases, and any Court having competent jurisdiction to hear appeals therefrom.

Creditor: Any person that holds an Allowed Claim, including governmental units.

Chopin: Chopin Associates, a Florida partnership, one of the Debtors.

Creditors Committees: The Creditors Committee of each of the Debtors, appointed by order of the Bankruptcy Court.

Debtor or Debtors: Gould, MCC, MCLP, Chopin and Holywell, individually and collectively.

Debtors' Plans: The five plans of reorganization, dated February 15, 1985, filed by each of the Debtors'.

Disputed Claim: A claim other than the BNY Debt and the BNY Holywell Loan (i) scheduled by the Debtors as disputed, contingent, undetermined, unliquidated or unknown; or (ii) as to which a timely proof of claim and objection has been filed, and which has not been determined by a Final Order.

Effective Date: The date upon which the Order of Confirmation is no longer subject to appeal, on which date no such appeal is then pending, and on which date all of the conditions to the effectiveness of the Plan expressly set forth in the Plan have been satisfied fully or effectively waived.

Final: Shall mean, with respect to any order, decree or judgment of any Court, that such order, decree or judgement is no longer subject to appeal or rehearing and as to which no appeal, rehearing or motion for rehearing is then pending.

FF&E: The furniture, fixtures and equipment owned by or leased to MCLP pursuant to the FF&E leases.

FF&E Leases: The following four FF&E Leases:

1. Lease, dated May 14, 1981, between MCLP, as Lessee and MCJV, as Lessor covering certain furniture, fixtures and equipment used in the Pavillon Hotel (the "Category A Lease").

2. Lease, dated May 14, 1981, between MCLP, as Lessee and MCJV, as Lessor covering certain furniture, fixture and equipment used in the Pavillon Hotel (the "Category B Lease").

3. Lease, [date unknown], between MCLP, as Lessee and Gould and/or one of the Gould Entities, as Lessor covering certain furniture, fixture and equipment used in the Pavillon Hotel (the "Category C Lease").

4. Lease, [date unknown], between MCLP, as Lessee and Gould and/or one of the Gould Entities, as Lessor covering certain furniture, fixture and equipment used in the Pavillon Hotel (the "Category D Lease").

Gould: Theodore B. Gould, an individual, one of the Debtors.

Gould Entities: Any of the entities comprising the defined term "Affiliated Creditors", which are directly or indirectly 100% owned by Gould, including but not limited to, Twin Development Corporation, Holywell, Whitehall Security, Inc., Orion Industries, Inc., Orion Engineering Services, Inc., Charleston Center Corp., 1300 N. 17th Street Associates, Eleven DuPont Circle Associates, DuPont Land Associates, 1616 Reminc Limited Partnership, 1616 Arlington Associates, PBA, Inc., TBG Institute, Racing Club of Florida, Inc., Parkwell Inc., Parkwell of Florida, Inc., Holywell Construction Company, Holywell Management Company of Florida, Inc., HWL Corporation, Peitro Belluschi & Associates, Inc., Holywell Hotels, Inc., Holywell Telecommunications Company, Holywell Trading of Florida, Inc., Holywell Real Estate, Holywell Telecommunications of Florida, Inc., Holywell Insurance Company, Corpus Christi Associates, Great Western Bank Building, WHA Corp. and Studley-Holywell Assoc., Inc., but not including MCJV.

Gould FF&E Leases: shall mean collectively, the Category C and Category D Leases.

Holywell Corporation: a Delaware corporation, one of the Debtors.

Market Value: $255,600,000, the appraised market value of Miami Center as of November 15, 1984 as indicated in an appraisal report by Charles V. Failla & Associates, Inc., which report was certified by Charles V. Failla & Associates, Inc., M.A.I.

MCLP: Miami Center Limited Partnership, a Florida limited partnership, one of the Debtors.

MCC: Miami Center Corporation, a Florida corporation, one of the Debtors.

MCJV Claim: shall mean the claim of MCJV filed by O&Y Florida on behalf of O&Y Florida and O&Y Equity for the benefit of MCJV, O&Y Florida and O&Y Equity for unpaid rent due under the MCJV FF&E Leases.

MCJV FF&E Leases: shall mean collectively the Category A and Category B Leases.

MCJV Property: Those unimproved parcels of land adjacent to, or near, Miami Center that are owned by MCJV.

MCJV: Miami Center Joint Venture, a Florida partnership, the partners of which are Gould and O&Y Florida.

Miami Center: The parcel of land located in Miami, Dade County, Florida owned by Chopin and leased to MCLP upon which there is constructed an office/hotel complex.

Miami Center Closing Date: 45 days from the Effective Date.

Order of Confirmation: The Order entered by the Court confirming the Plan in accordance with the provisions of Chapter 11 of the Code.

O&Y: shall mean O&Y Equity and O&Y Florida, collectively.

O&Y Equity: Olympia & York Equity Corp., a New York corporation.

O&Y Florida: Olympia & York Florida Equity Corp., a Florida corporation.

O&Y Arbitration: The arbitration proceeding known as *The Matter of Arbitration between Theodore B. Gould,*

Claimant and Olympia & York Florida Equity Corp. and O&Y Equity Corp., Respondents (Case No. 13-115-0547-82) which proceeding resulted in an Award, dated June 1, 1984. On or about September 20, 1984 O&Y filed a motion requesting the Court to lift the automatic stay, to remove Gould as managing joint venture partner and to require Gould to deliver documents to effectuate his removal. On October 24, 1984 an Order was entered denying that part of O&Y's Motion requesting the removal of Gould and the delivery of documents for his removal but granting a lifting of the automatic stay for the limited purpose of permitting O&Y or Gould to contest the Award. O&Y subsequently brought an action in the United States District Court for the Southern District of New York (Case No. 82-CIV-5918 (WK)), which action seeks to modify or vacate the Award. A hearing was held on February 1, 1985 before Judge Knapp of the Southern District, who reserved decision on the motion.

O&Y Claim: The Claim filed by O&Y Florida against certain of the Debtors on behalf of O&Y Florida and O&Y Equity for the benefit of MCJV, O&Y Florida and O&Y Equity.

Pavillon Hotel: The hotel located in Miami Center.

Parkwell: Collectively, Parkwell Inc., and Parkwell of Florida, Inc., both wholly owned subsidiaries of Holywell.

Pending Litigation: Shall mean the actions described in Exhibit C annexed hereto pending by or against any or all of the Debtors, which Exhibit was taken verbatim from the Debtors' Plans.

Petition Dates: August 22, 1984, the dates on which the Debtors filed their respective Chapter 11 petitions with the Court.

Plan: This Chapter 11 Plan, in its present form, or as it may be amended or modified in accordance with the Code.

Pro-rata: With respect to any distribution on account of any Allowed Claim, in the same proportion as the amount of such Allowed Claim bears to the aggregate amount of all Allowed Claims of its class.

Secured Claim: An Allowed Claim secured by a lien, security interest, judgment or other charge against or interest in property in which any Debtor or the Debtors have an interest, or which is subject to setoff under Section 553 of the Code, not voidable under any section of the Code to the extent of the value (determined in accordance with Section 506(a) of the Code) of the interest of the holder of such Allowed Claim in the Debtors' interest in such property or to the extent of the amount subject to such setoff, as the case may be.

Washington Partnerships: 1300 North 17th Street Associates, 1616 Reminc Limited Partnership, Twin Development Corporation, Eleven DuPont Circle Associates and DuPont Land Associates.

Washington Proceeds: The sum of approximately $32,422,798.87, which was received by Gould and certain Gould Entities from the sale of the Washington Properties and which is being held, subject to Court order, in accounts established at Florida National Bank.

Washington Properties: The real and personal property conveyed by the Washington Partnerships pursuant to the Agreement dated July 26, 1984, as amended, by and between the Hadid Investment Group, Inc. and the Washington Partnerships.

II. SUBSTANTIVE CONSOLIDATION

Provision for Substantive Consolidation

The Chapter 11 cases filed by the Debtors as Case Nos. 84-01590, 84-01591, 84-01592, 84-01593, and 84-01594 shall on the Effective Date be substantively consolidated pursuant to this Plan and the property of the estates of the Debtors shall be treated as common assets and the Claims of their Creditors deemed Claims against the common assets. As a result of the substantive consolidation of the Debtors, all Claims between and among the Debtors are eliminated by this Plan, including without limitation, all pre-petition claims, all claims, if any, relating to the ground lease between Chopin and MCLP, all claims, if any, relating to or arising out of the Gould FF&E Leases, and all claims of reimbursement, subrogation, and contribution between and among all Debtors.

III. CLASSIFICATION OF CLAIMS AND INTERESTS

For the purposes of distribution under this Plan, Claims and Secured Claims of all Debtors are divided into the following classes:

Class 1—Administration Claims as the same are allowed and ordered paid by the Court.

Class 2—The Secured Claim of BNY for the BNY-Debt, including interest at the pre-default contract rate to February 1, 1984 and at the post-default contract rate thereafter, attorneys' fees, costs and expenses, as provided in the documents evidencing such claims and as authorized under applicable law, as the same are allowed and ordered paid by the Court.

Class 3—The Secured Claim of BNY for the BNY Holywell Loan including interest at the pre-default contract rate to August 31, 1984 and at the post-default contract rate thereafter, attorneys' fees, costs and expenses, as provided in the documents evidencing such claims and as authorized under applicable law, as the same are allowed and ordered paid by the Court.

Class 4—All Secured Claims other than the BNY Debt and the BNY Holywell Loan, including interest at the rate of 10% per annum and attorneys' fees, as authorized under applicable law, as the same are allowed and ordered paid by the court.

Class 5—All Claims which are entitled to priority under Code §507 as the same are allowed, approved and ordered paid by the Court, including claims for wages, salaries and commissions entitled to priority under §507(a)(3) and tax claims of governmental units entitled to priority made §506 and §507(a)(6), and including interest on such Claims as authorized by applicable law and allowed any ordered paid by the Court.

Class 6—The Claims of all general unsecured creditors, excluding claims of Affiliated Creditors, and excluding the MCJV Claim and the O&Y Claim.

Class 7—The MCJV Claim and the O&Y Claim.

Class 8—The Claims of Affiliated Creditors.

Class 9—The interest of the Debtors which remain after consummation of this Plan.

IV. MEANS FOR EXECUTION OF THE PLAN

Sale of Miami Center

The Plan would be implemented by a sale of Miami Center to BNY or its designee for a purchase price of $255,600,000 pursuant to a contract of sale substantially in the form of Exhibit A annexed hereto (the "Contract of Sale"). Within 5 business days after the Effective Date, the Trustee and BNY or its designee would execute the Contract of Sale, which requires a closing of title within 45 days after the Effective Date.

The purchase price would be paid and applied in the following manner:

(a) BNY would receive a credit for the amount of the BNY Debt plus expenses to the Miami Center Closing Date, which, assuming a closing date of June 1, 1985, and no change in BNY's Prime Rate, would be $236,587,618.

(b) BNY would pay the balance of the purchase price in cash (approximately $19,012,382) to the Trustee. The Trustee shall be required to: (i) pay (if requested by BNY, under protest) from such cash the real estate taxes for 1983 and 1984, and pay the Debtors' pro rata portion of the real estate taxes for 1985 due to the Miami Center Closing Date. (ii) pay (if requested by BNY, under protest) from such cash the Personal Property taxes for 1983 and 1984, and pay the Debtors' pro rata portion of the personal property taxes for 1985 due to the Miami

Center Closing Date. (iii) take all steps and to make all payments, from such cash (and, if necessary, from the Washington Proceeds) to exercise the purchase option in the MCJV FF&E leases, and to obtain title to the FF&E covered by the MCJV FF&E Leases.

Title to Miami Center would be delivered to BNY or its designee by the Trustee free and clear of all leases, liens, encumbrances and contracts affecting Miami Center, except those set forth on Exhibit B attached hereto, and except as provided in Article XI hereof. At the closing BNY or its designee would receive fee title to the FF&E covered by the Gould FF&E Leases, as a result of the merger of such leases effected by the substantive consolidation of the estates (or Gould, any of the Debtors, or the Trustee would cause any of the Gould Entities that are Lessors under the Gould FF&E Leases to convey directly to MCLP the FF&E covered by such Leases) and would receive fee title to the FF&E covered by the MCJV FF&E Leases as a result of the exercise of the purchase option on the Miami Center Closing Date. On the Effective Date all other liens and encumbrances, including the mechanics liens and judgment liens on Miami Center are transferred and shall attach to the Trust Property, including the Washington Proceeds, subject to the security interests of BNY securing the BNY Holywell Loan. All contracts affecting Miami Center that are not to be assumed will be rejected in accordance with Article XI hereof. Upon the passing of title of Miami Center to BNY, BNY's lien and security interest in the Washington Proceeds and the other collateral shall be limited to the BNY-Holywell Loan, and the balance of the Washington Proceeds will be available for distribution to Creditors.

BNY may elect to retain its mortgages on and security interests in Miami Center after the passing of title; however, upon the passing of title, the personal liability of the Debtors

on the obligations that are secured by such mortgages and security interests shall be released.

V. CREATION OF TRUST

1. A Trust is hereby declared and established on behalf of the Debtors effective on the Effective Date and an individual to be appointed by the Court (and if requested, after nominations by any party-in-interest) is designated as Trustee of all property of the estates of the Debtors within the meaning of §541(a) of the Code, including but not limited to, Miami Center, the Washington Proceeds, and all claims and causes of action, if any, of the Debtors described in Exhibit C and those pending in the litigation against BNY ("Trust Property") to hold, liquidate, and distribute such Trust Property according to the terms of this Plan. The Trust shall be known as the "Miami Center Liquidating Trust".

2. On the Effective Date, all right, title and interest of the Debtors in and to the Trust Property, including Miami Center, shall vest in the Trustee, without further act or deed by the Debtors or any other of them, and without the filing or recording of any instrument of conveyance, assignment or transfer, *subject however*, to all existing liens, mortgages, security interests and encumbrances.

3. Subject to the provisions of this Plan, and in order to insure the prompt implementation of the Plan, the Trustee shall have full power and authority to:

(a) Enter into the Contract of Sale and to perform all acts that are necessary or appropriate to effect the sale of Miami Center to BNY or its designee in accordance with the Contract of Sale;

(b) Perfect and secure his right, title and interest to the Trust Property;

(c) Reduce all of the Trust Property to his possession and hold the same;

(d) Sell and convert the Trust Property to cash and distribute the proceeds as specified herein;

(e) Manage, operate, improve, and protect the Trust Property as specified herein;

(f) Lease or renew leases;

(g) Grant options to purchase and to contract to sell and sell the property owned by the Trust or any part or parts thereof for such purchase price and for cash or on such terms as may be appropriate;

(h) Mortgage, pledge or otherwise encumber the Trust Property or any part or parts thereof;

(i) Exchange and re-exchange the Trust Property or any part or parts thereof for other real or personal property;

(j) Release, convey or assign any right, title or interest in or about the Trust Property;

(k) Pay and discharge any mortgage or other lien or encumbrance against the Trust Property and pay and discharge any other costs, expenses or obligations deemed necessary to preserve the Trust Property or any part thereof or to preserve the Trust;

(l) Improve or repair the Trust Property or any part thereof;

(m) Purchase insurance of all kinds sufficient to protect fully the Trust Property and to protect from liability

the Trustee, the Creditors Committees and the employee of any member of the Creditors Committees;

(n) Deposit trust funds and draw checks and make disbursements thereof;

(o) Employ attorneys, accountants, engineers, agents, realtors, rental agents, tax specialists and clerical and stenographic assistants as may be deemed necessary, at such compensation as the Trustee may deem reasonable;

(p) Take any action required or permitted by this Plan;

(q) Sue and be sued;

(r) Appoint, remove and act through agents, managers and employees and confer upon them such power and authority as may be necessary or advisable;

(s) Invest funds of the Trust in demand and time deposits in any national bank which is an authorized depository for bankruptcy funds in the federal district in which the Trustee resides or to make temporary investments such as short-term certificates of deposit in such bank or treasury bills;

(t) Prosecute and defend all actions affecting the Trust Property;

(u) Settle, compromise, release, discontinue, or adjust by arbitration or otherwise any disputes, litigations, or controversies in favor of or against the Trust Property or the Debtors or any of them, including but not limited to the discontinuances required by the Contract of Sale;

(v) Waive or release rights of any kind relating to the Trust Property or the Debtors or any of them, including but not limited to the releases required by the Contract of Sale;

(w) Deal with the Trust Property or any part or parts thereof in all other ways as would be lawful for any person owning the same to deal therewith, whether similar to or different from the ways above specified, at any time or times hereafter.

(x) Take no action that would change the business of any of the Debtors as conducted at or prior to the filing of the Petitions.

4. In no case shall any party dealing with the Trustee in any manner whatsoever in relation to the Trust Property, or to any part or parts thereof, be obligated to see that the provisions of this Plan or the terms of the Trust have been complied with, or be obligated or privileged to inquire into the authority of the Trustee to act, or to inquire into any other limitation or restriction of the power and authority of the Trustee, but as to any party dealing with the Trustee in any manner whatsoever in relation to the Trust Property, the power of the Trustee to act or otherwise deal with said properties shall be absolute.

5. The Trustee shall receive reasonable compensation for his services subject to the approval of the Court which fee shall be a charge against and paid out of the Trust Property.

6. All costs, expenses and obligations incurred by the Trustee in administering the Trust or in any manner connected, incidental or related thereto, shall be a charge against the Trust Property, and the Court, upon being satisfied as to the correctness of any and all such costs, expenses and obligations, shall approve and direct the

payment thereof prior to a distribution to the holders of unsecured Allowed Claims.

7. No recourse shall ever be had, directly or indirectly, against the Trustee or any of his agents or employees personally by legal or equitable proceedings or by virtue of any statute or otherwise, it being expressly understood and agreed that all liabilities of the Trustee or such agents are employees or under this Trust shall be enforceable only against and be satisfied only out of the Trust Property.

8. The Trustee shall not be liable for any act or failure to act in his capacity as trustee hereunder while acting in good faith and in the exercise of his best judgment, nor shall the Trustee be liable in any event except for his own gross negligence, willful default or misconduct.

9. The Trustee may resign at any time by giving written notice of his intention to do so addressed to the Court, and such resignation shall be effective upon the date provided in such notice.

10. In case of the resignation of the Trustee, a successor shall thereupon be appointed by an instrument in writing, signed and acknowledged (i) prior to the acquisition of Miami Center by BNY, by BNY and the Creditors' Committee and (ii) subsequent to the acquisition of Miami Center, by the Creditors Committees and delivered to the resigning Trustee, whereupon such resigning Trustee shall convey, transfer and set over to such successor in trust by appropriate instrument or instruments all of the Trust Property then in his possession and held hereunder. Said successor shall thereupon be vested with all the rights, privileges, powers and duties of the Trustee named herein. Each succeeding Trustee may in like manner resign, and another may in like manner be appointed in his place.

11. If BNY or the Creditors Committees at any time desire to terminate the rights of the Trustee then acting under the Trust and appoint a new Trustee in his stead, BNY and the Creditors Committees may do so by a written instrument, addressed to such Trustee then acting; thereupon like conveyances as in the case of resignation of the Trustee shall be made by the Trustee then acting to the newly appointed Trustee, and such new Trustee shall be vested with all the rights, privileges, powers and duties of the Trustee herein named.

VI. TREATMENT OF CLAIMS AND DISTRIBUTION

The cash portion of the Trust Property, together with interest thereon, shall be distributed by the Trustee to satisfy the interest of each Class as defined above (other than the BNY Class 2 Claim) in the following manner and order of priority:

1(a). Class 1 Claims are not impaired. As soon as practicable after the Miami Center Closing Date, all allowed Class 1 Claims which have been incurred prior to the Effective Date and which have been approved by a Final Order of the Court shall be paid by the Trustee in full, unless the holder of any such Class 1 Claims shall have agreed to a different treatment of such Class 1 Claims in which case the holder of such Class 1 Claims shall be paid in accordance with such agreement.

1(b). Class 1 Claims which have been incurred prior to the Effective Date and which have not been approved by the Court on or before the Miami Center Closing Date shall be paid by the Trustee, in full as soon as practicable after the same have been approved by a Final Order of the Court, unless the holder of any such Class 1 Claims shall have agreed to a different treatment of such, in which case the

holder of such Class 1 Claims shall be paid in accordance with such agreement.

1(c). Class 1 Claims incurred subsequent to the Consummation Date shall be paid by the Trustee, in full, as soon as practicable after the same have been approved by the Creditors Committees unless the holder of any such Class 1 Claim shall have agreed to a different treatment of such Claim, in which case the holder of such Class 1 Claim shall be paid in accordance with such agreement.

2. The Class 2 Claim is impaired. The Class 2 Claim consisting of the principal of the BNY Debt and interest thereon at the pre-default contract rate to the Miami Center Closing Date shall be paid and satisfied in accordance with the provisions of Article IV hereof.

3. The Class 3 Claim is impaired. As soon as practicable after the Miami Center Closing Date, the Class 3 Claim consisting of the principal of the BNY Holywell Loan and interest thereon at the pre-default contract rate shall be paid.

4. Class 4 Claims are impaired. As soon as practicable after the Miami Center Closing Date, all Allowed Class 4 Secured Claims shall be paid in full as to principal and shall be paid interest at the rate of 10% per annum.

5. Class 5 Claims are not impaired. As soon as practicable after the Miami Center Closing Date all Allowed Class 5 Claims shall be paid by the Trustee, in full, in an amount equal to the allowed amount of such Class 5 Claim plus interest, unless the holder of any such Class 5 Claim shall have agreed to a different treatment of such Class 5 Claim, in which case the holder of such Class 5 Claim shall be paid in accordance with such agreement.

6. Class 6 Claims may be impaired if there are not sufficient funds to pay this class in full with interest. As soon as practicable after the Miami Center Closing Date all Allowed Class 6 Claims, after payment of the Allowed Class 1, 2, 3, 4 and 5 claims shall be paid in full or in part Pro Rata.

7. Class 7 Claims may be impaired. As soon as practicable after the Miami Center Closing Date, and the entry of a Final Order or Judgment resolving the O&Y Arbitration, the Allowed Class 7 Claims will be paid from the MCJV Property, if there is a deficiency the claim will be paid to the extent that funds are available after payment of the Allowed Class 1, 2, 3, 4, 5 and 6 Claims.

8. Class 8 Claims are impaired. As soon as practicable after the Miami Center Closing Date and after the payment of Allowed Class 1, 2, 3, 4, 5, 6 and 7 Claims, all Allowed Class 8 Claims shall be paid in full or in part Pro Rata.

9. Class 9 Claims are impaired. As soon as practicable after the Miami Center Closing Date all Allowed Class 7 Claims, after payment of Allowed Class 1, 2, 3, 4, 5, 6, 7 and 8 claims the residue of the estates shall be paid to the Debtors Pro Rata.

VII. DISPUTED CLAIMS

A. *Disputed Claim Fund.* As soon as is practicable after the Miami Center Closing Date, and after payment of the Class 1, 2, 3, and 4 Claims out of Trust Property, the Trustee shall establish the Disputed Claim Fund, in an initial amount reasonably necessary to pay the Debtors' anticipated liability on Disputed Claims.

B. *Investment of Disputed Claim Fund.* The Disputed Claim Fund shall be maintained by the Trustee in a separate bank account, and invested and reinvested at prevailing

market rates of interest, for like amounts and periods of investment, pending the determination of the allowed amount of each Disputed Claim.

C. *Distribution from Disputed Claim Funds.*

1. *Distribution on Allowed Portion of Claim.* If a Disputed Claim is allowed, in whole or in part, the Trustee shall distribute to the holder of any such Disputed Claim an amount equal to what the holder of such Disputed Claim would have received on the Effective Date if such Disputed Claim were an Allowed Claim.

2. *Distribution of Cash Deposited in Respect of Disallowed Portion of Claim.* If a Disputed Claim is disallowed, in whole or in part, the Trustee shall distribute to the holders of class of creditors that has not paid in full their Pro Rata share of cash theretofore deposited in the Disputed Claim Fund allocable to the disallowed amount of such Disputed Claim.

VIII. DUTIES OF THE DEBTORS

Commencing on the Effective Date and continuing thereafter, the Debtors shall devote such time and attention to the affairs of the estates as are necessary to carry out the provisions of the Plan and to comply from time to time with the reasonable requests of BNY, the Trustee and the Creditors Committees. Without limitation of the foregoing the Debtors shall,

(a) in connection with the sale and transfer of Miami Center as provided in Article IV hereof, take all actions requested by BNY, the Trustee or the Creditors Committees to promptly effectuate the sale thereof, including, without limitation, (i) grant

BNY and its attorneys, agents, and accountants full and complete access to the books and records of the Debtors relating in any way to Miami Center and permit BNY to contact any tenants or prospective tenants in Miami Center in connection with the terms and conditions of their occupancy or their proposed occupancy, (ii) deliver to the Trustee, promptly after the Effective Date, all documents required to be delivered to BNY under the Contract of Sale, including but not limited to, all plans specifications, drawings, as built plans and surveys, plans, inventories of all personal property, operating manuals, licenses service and maintenance contracts, and warranties, (iii) take all steps, execute and deliver all documents, and supply all information necessary or appropriate to close the Contract of Sale and to effectuate a transfer of title to Miami Center as contemplated by Article IV hereof, and the Contract of Sale.

(b) In connection with the distribution to the creditors of the Washington Proceeds and the implementation of the Plan, take all action and supply all information required of Debtors and/or requested by the Creditors Committees or the Trustee in connection with the prompt and timely prosecution of objections to claims filed against the estates, the prompt and speedy defense of litigation against the estates and the execution of all documents and the performance of all acts as may be necessary or desirable to promptly implement and effectuate the distribution to the creditors of the estates, other than Affiliated Creditors and the overall implementation of the Plan. The Debtors shall cooperate fully with the Trustee and Creditors Committees and shall grant to the Trustee and

Creditors Committees access to and shall permit the Trustee and Creditors Committees to copy all financial statements, tax returns, books and records of every kind as are within the possession, custody control of any of the Debtors regarding objections to claims against the estate with a view toward the prompt determination of said objections and a prompt consummation of the Plan.

(c) Take any and all actions requested by BNY, the Trustee on the Creditors Committee which are deemed necessary or appropriate by BNY, the Trustee, or the Creditors Committee to implement and perform this Plan, whether or not specifically enumerated herein.

IX. CONDITION PRECEDENT TO THE EFFECTIVENESS OF THE PLAN

A. The Effective Date shall have occurred.

X. CONDITIONS SUBSEQUENT TO THE EFFECTIVENESS OF THE PLAN

A. The Miami Center Closing Date shall have occurred, in any event, by no later than July 1, 1985, and BNY shall have received by such date the discontinuance and releases required to be delivered to BNY under the Contract of Sale. In the event the conditions subsequent have not been satisfied, at BNY's option this Plan shall no longer be effective, and all obligations and agreements of BNY and its designee shall terminate and be of no effect.

XI. EXECUTORY CONTRACTS

A. The executory contracts and unexpired leases listed in Exhibit D and any other existing executory contracts or

unexpired leases relating to Miami Center Phase I with any party not affiliated with any of the Debtors are hereby assumed, unless prior to the Confirmation Date, BNY shall modify this Plan to add or to delete executory contracts or unexpired leases from Exhibit D.

B. Except for executory contracts expressly assumed or rejected prior to sixty (60) days before the date of the Confirmation Order in accordance with 11 U.S.C. § 365, or paragraph A of this Article all executory contracts and unexpired leases of the Debtors shall be deemed rejected as of the date of the Confirmation Order. Claims for damages resulting from the rejection of executory contracts shall be filed with the Court no later than thirty (30) days prior to the date of the Confirmation Order or be forever barred and precluded from consideration or participation in distributions from the estate. Claims for damages resulting from executory contracts which are deemed rejected as of the date of the Confirmation Order in accordance with this Article shall be filed with the Court or be forever barred and precluded from consideration or participation in distributions from the estate. Objections to any such Claims shall be filed by the Trustee or the Creditors Committees with the Bankruptcy Court within twenty (20) days after the Claim in question has been filed.

XII. MODIFICATION OF THE PLAN

BNY may amend or modify this Plan at any time prior to the entry of the Order of Confirmation, pursuant to Section 1127 (a) of the Code. After the entry of the Order of Confirmation, BNY may, pursuant to Section 1127(b) and (c) of the Code and with approval of the Court, modify or amend the Plan in a manner which does not materially or adversely affect the interests of persons affected by the Plan without having to solicit acceptances of such modification, and may take such steps as are necessary to carry out the purpose and effect of the Plan as modified.

XIII. RESERVATION OF EQUITABLE RIGHTS

Notwithstanding anything to the contrary contained herein, all rights are reserved to any party-in-interest, by appropriate proceeding, to assert any equitable claim for relief from the substantive consolidation provisions of the Plan, if, but only to the extent, such substantive consolidation, materially and adversely affects the rights of such party in interest.

XIV. RETENTION OF JURISDICTION

The Court shall retain jurisdiction after confirmation until all payments and distributions called for under the Plan had been made and until the entry of final decree, in respect to the following matters:

(a) to hear and determine all claims, including claims arising from the rejection of any executory contract and any objections which may be made thereto;

(b) to liquidate, or estimate damages or to determine the manner and time for such liquidation or estimation in connection with any contingent or unliquidated claims;

(c) to adjudicate all claims or controversies arising during the pendency of the Chapter 11 cases;

(d) to allow or disallow any claim; and

(e) to make any orders which may be necessary or appropriate to carry out the provisions of this Plan, including any orders relating to the reservation of equitable rights set forth in Article XIII hereof.

Dated: February 26, 1985, as amended as of March 22, 1985.

THE BANK OF NEW YORK

By: /s/
Vice President

EMMET, MARVIN & MARTIN

By: /s/ THOMAS F. NOONE
48 Wall Street
New York, New York 10005
212-422-2974

STEEL, HECTOR & DAVIS

By: /s/ VANCE E. SALTER
Southeast Financial Center
Miami, Florida
305-577-2800

MEYER, WEISS, ROSE, ARKIN, SHAMPANIER, ZIEGLER & BARASH, P.A.

By: /s/ S. H. ZIEGLER
407 Lincoln Road
Miami Beach, Florida
305-538-2851

ATTORNEYS FOR THE BANK OF NEW YORK

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-TCB
84-01594-BKC-TCB

In re:

HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, and THEODORE B. GOULD,

Debtors.

STIPULATION AND ORDER RESPECTING IMPLEMENTATION OF AMENDED CONSOLIDATED PLAN OF REORGANIZATION PROPOSED BY THE BANK OF NEW YORK

THE BANK OF NEW YORK (the "Bank"), and the CREDITORS' COMMITTEES of Debtors MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION and HOLYWELL CORPORATION (collectively, the "Committees"), stipulate and agree by counsel as follows:

1. In the event that the Court confirms the Amended Consolidated Plan proposed by the Bank, the "Effective Date" established in the Bank's Amended Consolidated Plan shall be the date of confirmation, provided that the Court has denied any motion for rehearing or reconsideration, and provided that neither (a) the order of confirmation nor (b) any order denying rehearing or reconsideration has been stayed by any court.

2. In the event of any conflict between the Contract of Purchase attached to the Bank's Plan and the terms of the Plan itself, the terms of the Plan shall govern, provided that the resolution of such conflict does not adversely affect the title to the Miami Center project to be acquired by the Bank under its Plan.

3. The Bank agrees that any money realized as a result of the tax protests, presently in process for the prior years, shall be added to the fund for the payment of other creditors, provided that the Bank shall be permitted to make the determination to dismiss or settle any such tax protest suits or claims in the event the Bank determines in its sole judgment that it is in the best interest of the Bank to do so.

4. The Liquidating Trustee to be appointed by this Court under the Bank's Plan shall be directed by this Court (a) to pay all "Undisputed Claims" as set forth in an order of this Court, immediately after title to the Miami Center project is vested in the Bank or its nominee pursuant to the Contract of Purchase attached to the Bank's Plan (on or before a date forty-five (45) days after the Effective Date), and (b) to pay all Allowed Claims with interest at the full legal rate, if available in the liquidating fund, provided that such interest shall be paid 90 days after the payment of the principal.

5. The Holywell creditors are entitled to distribution from Holywell assets before distribution from such assets to creditors of other Debtors, and distribution to the Holywell creditors under the Bank's Plan shall be made from the Holywell assets prior to distribution from such assets to creditors of the other Debtors. Such distributions in respect to Undisputed Claims shall be made as provided in Paragraph 4 above, and a fund shall be established by the Liquidating Trustee as a reserve fund for disputed claims. As such disputed claims are allowed, they shall be paid from such fund.

6. In consideration of the approval of this stipulation by the Court and the entry of an Order to that effect, the Committees shall withdraw objections to confirmation of the Bank's Plan and shall encourage and advise their respective members to vote in favor of that Plan.

7. This stipulation shall terminate in the event, and at such time as, the hearing on confirmation of the Bank's Plan is delayed beyond May 31, 1985.

This stipulation is respectfully submitted for approval by the Court and shall become effective as of the date so approved.

THE BANK OF NEW YORK

STEEL HECTOR & DAVIS
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(212) 422-2974

MEYER WEISS ROSE ARKIN SHAMPANIER
ZIEGLER & BARASH, P.A.
407 Lincoln Road
Miami Beach, Florida 33139
(305) 538-2531

By: /s/ S. H. ZIEGLER
S. Harvey Ziegler, Esquire

CREDITORS' COMMITTEES OF
MIAMI CENTER LIMITED PARTNERSHIP and
MIAMI CENTER CORPORATION

HOLLAND & KNIGHT
1200 Brickell Avenue
Miami, Florida 33131
(305) 374-8500

By: /s/ IRVING M. WOLFF
Irving M. Wolff, Esquire

CREDITORS' COMMITTEE OF HOLYWELL
CORPORATION

BLANK, ROME, COMISKY & McCAULEY
4770 Biscayne Boulevard
Miami, Florida 33137
(305) 573-5500

By: /s/
Joel M. Aresty, Esquire

ORDER APPROVING STIPULATION

The terms of the foregoing stipulation are hereby approved. In the event that The Bank of New York's Amended Consolidated Plan of Reorganization is confirmed, the terms of the stipulation shall be incorporated in the Order of Confirmation.

DONE AND ORDERED, this _____ day of April, 1985, at Miami, Florida.

_____

UNITED STATES BANKRUPTCY JUDGE

CC: All Counsel of Record
on Attached Service List

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-TCB
84-01594-BKC-TCB

In re:

HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, and THEODORE B. GOULD,

Debtors.

ADDENDUM TO STIPULATION AND ORDER RESPECTING IMPLEMENTATION OF AMENDED CONSOLIDATED PLAN OF REORGANIZATION PROPOSED BY THE BANK OF NEW YORK

THE BANK OF NEW YORK (the "Bank"), and the CREDITORS' COMMITTEES of Debtors MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION and HOLYWELL CORPORATION (collectively, the "Committees"), stipulate and agree by counsel to an Addendum to Stipulation and Order Respecting Implementation of Amended Consolidated Plan of Reorganization Proposed by the Bank of New York, as follows:

1. We understand that paragraph 1 of the Stipulation means that the effective date will be no later than 45 days after the confirmation date provided that there is on the

effective date no stay in effect and no Motion for Rehearing or reconsideration pending.

2. We understand that notwithstanding anything in the plan or contract to the contrary, not more than $2,000,000.00 will be paid under paragraph 4(c) as provided in the plan until all creditors through class 6 are paid in full, including their interest.

3. We understand that the provisions of paragraph 4(b) to the Stipulation as to interest and the payment date thereof also applies to the undisputed claims in paragraph 4(a).

4. We understand that the payment or undisputed claims in paragraph 4 of the stipulation will be with respect to the undisputed portion of each claim and will be without prejudice to the later allowance of the disputed portion of each claim.

This stipulation is respectfully submitted for approval by the Court and shall become effective as of the date so approved.

THE BANK OF NEW YORK

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(212) 422-2974

MEYER WEISS ROSE ARKIN SHAMPANIER
ZIEGLER & BARASH, P.A.
407 Lincoln Road
Miami Beach, Florida 33139
(305) 538-2531

By: /s/ S. H. ZIEGLER
, Esquire

CREDITORS' COMMITTEES OF
MIAMI CENTER LIMITED PARTNERSHIP and
MIAMI CENTER CORPORATION

HOLLAND & KNIGHT
1200 Brickell Avenue
Miami, Florida 33131
(305) 374-8500

By: /s/ IRVING M. WOLFF
Irving M. Wolff, Esquire

CREDITORS' COMMITTEE OF HOLYWELL
CORPORATION

BLANK, ROME, COMISKY & McCAULEY
4770 Biscayne Boulevard
Miami, Florida 33137
(305) 573-5500

By: /s/ JOEL M. ARESTY
Joel M. Aresty, Esquire

ORDER APPROVING ADDENDUM TO STIPULATION

The terms of the foregoing addendum to stipulation are hereby approved. In the event that The Bank of New York's Amended Consolidated Plan of Reorganization is confirmed, the terms of the addendum to stipulation shall be incorporated in the Order of Confirmation.

DONE AND ORDERED, this _____ day of April, 1985, at Miami, Florida.

_____

UNITED STATES BANKRUPTCY JUDGE

cc: All Counsel of Record
on Attached Service List

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-TCB
84-01594-BKC-TCB

In re:

HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, and THEODORE B. GOULD,

Debtors.

SECOND ADDENDUM TO STIPULATION AND ORDER RESPECTING IMPLEMENTATION OF AMENDED CONSOLIDATED PLAN OF REORGANIZATION PROPOSED BY THE BANK OF NEW YORK

THE BANK OF NEW YORK (the "Bank"), and the CREDITORS' COMMITTEES of Debtors MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION and HOLYWELL CORPORATION (collectively, the "Committees"), stipulate and agree by counsel to a Second Addendum to Stipulation and Order Respecting Implementation of Amended Consolidated Plan of Reorganization Proposed by the Bank of New York, as follows:

1. The Stipulation and Addendum to Stipulation are effective and binding between the parties regardless of whether the Court enters orders approving the same.

2. The Stipulation and Addendum are effective and binding between the parties regardless of whether the hearing on confirmation of the Bank of New York's plan is delayed beyond May 31, 1985.

3. The parties hereto agree to request the Court to approve the Stipulation, Addendum and this Second Addendum.

THE BANK OF NEW YORK

STEEL HECTOR & DAVIS
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(305) 577-2804

EMMET MARVIN & MARTIN
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New York, NY 10005
(212) 422-2974

MEYER WEISS ROSE ARKIN SHAMPANIER
ZIEGLER & BARASH, P.A.
407 Lincoln Road
Miami Beach, Florida 33139
(305) 538-2531

By: _____

, Esquire

CREDITORS' COMMITTEES OF
MIAMI CENTER LIMITED PARTNERSHIP and
MIAMI CENTER CORPORATION

HOLLAND & KNIGHT
1200 Brickell Avenue
Miami, Florida 33131
(305) 374-8500

By: _____
Irving M. Wolff, Esquire

CREDITORS' COMMITTEE OF HOLYWELL
CORPORATION

BLANK, ROME, COMISKY & McCAULEY
4770 Biscayne Boulevard
Miami, Florida 33137
(305) 573-5500

By: /s/ JOEL M. ARESTY
Joel M. Aresty, Esquire

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

CASES NO. 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-TCB
84-01594-BKC-TCB

IN RE:

HOLYWELL CORPORATION, et al.

Debtors.

NOTICE OF FILING OF SECOND AMENDMENT TO THE AMENDED CONSOLIDATED PLAN PROPOSED BY THE BANK OF NEW YORK

The Bank of New York (the "Bank") has filed a Second Amendment to the Amended Consolidated Plan proposed by the Bank. The Second Amendment is intended to permit immediate confirmation of the Bank's plan while certain legal disputes continue. In substance, the amendments:

1. Provide for the execution and delivery of a Funding Agreement between the Bank and the Trustee (to be appointed under the plan) to enable the Trustee to deliver the furniture, fixtures, and equipment covered by the MCJV FF&E Leases to the Bank or its designee. Pursuant to the Second Amendment, the MCJV FF&E Lease Claim will be paid, on the terms set forth in the Funding Agreement, when all of the disputes relating to the MCJV FF&E Lease Claim have been finally settled or adjudicated.

2. Provide for the issuance by the Trustee to the Bank of a Trustee's Certificate for the amount of any funds

advanced by the Bank pursuant to the Funding Agreement. The obligation of the Trustee under any such Trustee's Certificates will be a Class 1 Claim which shall have priority of payment from, and which shall be secured by, all assets of the debtors' estates after payment or provision has been made for all other Class 1 claims and all Class 2 through Class 6 claims filed by the bar date (January 15, 1985) in these cases, as finally allowed by the Court, and allowed Trustee's fees and expenses in the Chapter 11 cases (but not in any superseding Chapter 7 cases).

The Second Amendment does not adversely affect the rights of the Class 1 through Class 6 creditors or reduce the amount of money available to pay such creditors' claims. Accordingly, no additional disclosure to, or solicitation of acceptances of the Second Amendment from, such creditors is required.

Respectfully submitted,

EMMET MARVIN & MARTIN
48 Wall Street
New York, NY 10005
(212) 422-2974

THERREL BAISDEN & MEYER WEISS
407 Lincoln Road
Miami Beach, Florida 33139
(305) 538-2531

STEEL HECTOR & DAVIS
4000 Southeast Financial Center
200 South Biscayne Blvd.
Miami, Florida 33131-2398
(305) 577-2804

By: /s/ VANCE E. SALTER
Vance E. Salter

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was delivered by hand or by mail (as indicated) to counsel listed on the attached service list this 30th day of July, 1985.

By: /s/ VANCE E. SALTER
Vance E. Salter

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

CASES NO. 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-TCB
84-01594-BKC-TCB

IN RE:

HOLYWELL CORPORATION, et al.

Debtors.

SECOND AMENDMENT TO AMENDED CONSOLIDATED PLAN OF REORGANIZATION PROPOSED BY THE BANK OF NEW YORK

The Bank of New York hereby amends its proposed Amended Consolidated Plan of Reorganization as follows:

1. Add to Article I the following definitions:

"*BNY Funding Agreement*: BNY's agreement to advance to the Trustee up to $14,417,679, in substantially the form of Exhibit E attached hereto."

"*Trustee's Certificate*: The Trustee's Certificate of indebtedness to BNY under the Funding Agreement, in substantially the form of Exhibit F attached hereto."

2. Amend Article III, "*Class 1*" [page 14], to read:

"*Class 1*—Administration Claims, as the same are allowed and ordered by the Court, and liabilities of the Trustee under any Trustee's Certificate."

3. Add to Article IV, subparagraph (b) (iii) [page 18] the following:

"On the Miami Center Closing Date, BNY agrees to execute and deliver to the Trustee the BNY Funding Agreement."

4. Add to the last paragraph of Article IV [page 19] the following:

"Notwithstanding anything herein contained to the contrary, the liability of the Trustee and the Debtors to BNY under any Trustee's Certificate(s) shall survive the passing of title."

5. Add to Article V, subparagraph (3) [page 24], the following:

"(y) borrow from BNY as contemplated by the BNY Funding Agreement and issue Trustee's Certificates to evidence such borrowing."

6. Change the date in Article X [page 36] from July 1, 1985 to September 15, 1985.

Dated: July 30, 1985

THE BANK OF NEW YORK, by its undersigned attorneys:

EMMET MARVIN & MARTIN
48 Wall Street
New York, NY 10005
(212) 422-2974

THERREL BAISDEN & MEYER WEISS
407 Lincoln Road
Miami Beach, Florida 33139
(305) 538-2531

STEEL HECTOR & DAVIS
4000 Southeast Financial Center
Miami, Florida 33131
(305) 577-2800

By: /s/ VANCE E. SALTER
Vance E. Salter

EXHIBIT E

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

CASES NO. 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-TCB
84-01594-BKC-TCB

IN RE:

HOLYWELL CORPORATION, et al.

Debtors.

FUNDING AGREEMENT

Agreement made this _____ day of _____, 1985 between The Bank of New York ("BNY") and _____, as Trustee.

BACKGROUND

BNY filed a Consolidated Plan of Reorganization in the captioned proceedings on February 26, 1985, which was amended on March 22, 1985. BNY's plan contemplated the acquisition by BNY for $255,600,000 of the Miami Center Project, which includes an office building, hotel, podium, all furniture, fixtures and equipment ("FF&E") used therein, together with the land upon which such improvements are located. Pursuant to two lease agreements dated May 14, 1981 (the "MCJV FF&E Leases"), Miami Center Joint Venture ("MCJV"), a joint venture consisting of debtor Theodore B. Gould ("Gould") and Olympia & York Florida Equity Corp. ("O&Y"), leased certain FF&E to debtor Miami Center Limited Partnership ("MCLP"). BNY's Amended Plan

of Reorganization required MCLP to deliver title to the FF&E covered by the MCJV FF&E Leases to BNY free and clear of all claims of MCJV.

O&Y on behalf of MCJV filed a claim in the captioned proceedings in connection with the MCJV FF&E Leases on December 20, 1984. On July 3, 1985 MCJV (with the approval of Gould and O&Y) filed a claim in connection with the MCJV FF&E Leases in the total amount of $14,417,679; that claim was intended to supersede the earlier claim (the MCJV FF&E claim as so superseded is hereinafter called the "MCJV FF&E Lease Claim"). BNY's Amended Plan of Reorganization classified the MCJV Lease Claim as a Class 7 claim, subordinate in right of payment to all third-party creditor claims (Classes 1 through 6). Objections were filed on behalf of MCJV to the proposed classification. BNY has filed Objections to the MCJV FF&E Lease Claim. In addition, BNY maintains that the MCJV FF&E Leases are not "true leases", but are instead financing agreements. By judgment entered July 17, 1985, from which an appeal has been taken by BNY, the Bankruptcy Court determined that the MCJV FF&E Leases were "true leases".

BNY filed a Second Amended Consolidated Plan which, among other things, provided for the execution and delivery of this Funding Agreement to enable the Trustee to deliver the FF&E covered by the MCJV FF&E Leases to the Bank or its designee. BNY's proposed plan as so amended is hereinafter called "BNY's Amended Plan". BNY's Amended Plan was confirmed by Order dated _____, 1985 and the Trustee was appointed to the Amended Plan by Order dated _____, 1985.

NOW THEREFORE, in consideration of the premises, the parties agree as follows:

1. If a Final Order (as defined in BNY's Amended Plan) is entered determining that the MCJV FF&E Lease Claim is entitled to payment prior to or concurrently with the Class 1 through Class 6 creditors' Allowed Claims as set forth in BNY's Amended Plan, BNY will advance to the Trustee, within 10 days after written request therefor, the difference between the amount of such claim as determined by that Final Order and the amount of funds available to the Trustee after payment to, and/or provision for, all Allowed Claims in Classes 1 through 6 of BNY's Amended Plan which were filed by the bar date (January 15, 1985). In no event shall BNY be required to advance more than $14,417,679 (the "Commitment Amount") hereunder. The Commitment Amount shall be reduced by the amount of any payments made by the Trustee from time to time in respect to the MCJV FF&E Lease Claim.

2. If a Final Order is entered determining that the MCJV FF&E Lease Claim has been properly classified in BNY's Amended Plan (as junior in priority of distribution to the Allowed Class 1 through Class 6 creditors), BNY shall have no obligation to advance any funds hereunder, and this Funding Agreement shall terminate.

3. The Trustee shall issue to BNY a Trustee's Certificate in substantially the form attached as Exhibit F, to evidence any funds advanced by BNY hereunder. The Trustee shall repay BNY from available funds and assets remaining in the debtors' estates, as set forth in the Trustee's Certificate.

4. Unless the context otherwise requires, all other terms used herein shall have the same meanings as set forth in the BNY's Amended Plan.

In Witness Whereof the parties hereto have caused the Funding Agreement to be executed this _____ day of _____, 1985.

THE BANK OF NEW YORK

By: _____
Vice-President

By: _____
_____, as Trustee

EXHIBIT F

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

CASES NO. 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-TCB
84-01594-BKC-TCB

PROCEEDINGS IN CHAPTER 11

IN RE:

HOLYWELL CORPORATION, et al.

Debtors.

CERTIFICATE OF INDEBTEDNESS OF _____, TRUSTEE

For value received _____, as Trustee (the "Trustee") of the Miami Center Liquidating Trust (the "Trust"), under the Consolidated Plan of The Bank of New York, dated February 26, 1985, as amended by First Amendment to Plan, dated March 22, 1985, and as amended by Second Amendment to Plan, dated July 30, 1985, (the "Plan"), promises to pay to the order of THE BANK OF NEW YORK, at its office at 48 Wall Street, New York, New York 10005 ("BNY") the sum of _____ ($_____), together with interest thereon from the date hereof to the date of payment at BNY's Prime Rate plus one percent (1%) per annum. "Prime Rate" shall mean the prime commercial lending rate of The Bank of New York as publicly announced to be in effect from time to time, such rate to be adjusted on and as of the effective date of any change in the Prime Rate. Such Prime Rate is not necessarily the lowest lending rate

offered by BNY to its customers from time to time. All interest based on the Prime Rate shall be calculated on the basis of a 360 day year for the actual number of days elapsed. Principal and accrued interest thereon shall be paid as and when funds are available to the Trustee from the liquidation of the debtors' estates.

Unless otherwise defined herein all capitalized terms used in this Certificate shall have the meaning set forth in the Plan.

This Certificate of Indebtedness is the Trustee's Certificate referred to in, and is issued pursuant to, the Plan and the Funding Agreement, and has been issued pursuant to the Order of Confirmation, dated _____.

The obligation of the Trustee under this Certificate is a Class 1 Claim and is entitled to priority in payment under Code Section 507 over all other claims, except (i) Class 1 Claims that have been paid or allowed prior to the date hereof and (ii) Allowed Class 2 through Class 6 Claims that were filed on or before January 15, 1985, together with allowed Trustee's fees and expenses.

In order to secure the obligations of the Trustee under this Certificate and to provide BNY with adequate protection, the Trustee, on behalf of the Trust, grants to BNY a first lien and security interest in all of the Trust Property and proceeds thereof, including without limitation all right, title and interest of the Trustee in the Award, in MCJV, and the proceeds thereof. The Trustee agrees to execute all such security agreements, financing statements, or other instruments as may be reasonably required by BNY in order to evidence or perfect such lien and security interest.

This Certificate shall be binding upon and inure to the benefit of the respective successors and assigns of each of the parties, including a Trustee in a superseding Chapter 7 case.

This Certificate shall be governed by and construed in accordance with the laws of the State of Florida and the Code.

In witness whereof, the Trustee has executed this Certificate on this _____ day of _____, 19____.

MIAMI CENTER LIQUIDATING TRUST

By: _____
Trustee

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

CASES NO. 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-TCB
84-01594-BKC-TCB

IN RE:

HOLYWELL CORPORATION, et al.

Debtors.

THIRD ADDENDUM TO STIPULATION AND ORDER RESPECTING IMPLEMENTATION OF SECOND AMENDED CONSOLIDATED PLAN PROPOSED BY THE BANK OF NEW YORK

THE BANK OF NEW YORK (the "Bank"), and the CREDITORS' COMMITTEES of debtors MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, and HOLYWELL CORPORATION (collectively, the "Committees"), stipulate and agree by counsel to this Third Addendum to the "Stipulation and Order Respecting Implementation of Amended Consolidated Plan of Reorganization Proposed by The Bank of New York", as follows:

1. The Stipulation, Addendum, and Second Addendum shall continue in full force and effect in respect to the Bank's proposed plan as amended July 30, 1985 by the "Second Amendment to Amended Consolidated Plan of Reorganization Proposed by The Bank of New York", except as set forth in Paragraph 2 of this Third Addendum.

2. The $2,000,000 limitation on payment to creditors below Class 6 (until creditors in Classes 1 through 6 have been paid; paragraph 2 of the First Addendum to the Stipulation) shall not apply to any payments made by the Bank under the additional "Funding Agreement" created as part of the Second Amendment to the Bank's proposed Plan.

3. The parties hereto agree to request the Court to approve the Stipulation, the Addendum and Second Addendum, and the Third Addendum to the Stipulation.

THE BANK OF NEW YORK

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By: /s/ VANCE E. SALTER
Vance E. Salter, Esquire

CREDITORS' COMMITTEES OF MIAMI CENTER LIMITED PARTNERSHIP and MIAMI CENTER CORPORATION

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By: /s/ IRVING M. WOLFF
Irving M. Wolff, Esquire

CREDITORS' COMMITTEE OF HOLYWELL CORPORATION

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